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In the

Supreme Court of the United States

Thomas Pearson, John Kowalkowski on behalf of themselves and all others similarly situated,
Petitioners,

v.

Component Technology Corporation a/k/a Comptech, a corporation, General Electric Capital Corporation, a corporation and TIFD VIII-R, Inc., a corporation,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The issue on appeal and for which Petitioner seeks Certiorari is what is the proper test to determine whether an affiliated corporation and/or secured lender is an "employer," under the Worker Adjustment Retraining Notification Act ("WARN Act"), 29 U.S.C. §2101 *et seq*.

PARTIES TO THE PROCEEDINGS

Petitioners

Thomas Pearson, John Kowalkowski on behalf of themselves and all others similarly situated. Petitioners Pearson and Kowalkowski have no corporate affiliations.

Respondents

Component Technology Corporation a/k/a Comptech, a corporation, General Electric Capital Corporation, a corporation and TIFD VIII-R, Inc., a corporation.

Other Parties

Thomas P. Agresti, Esq.; Kenneth Chestek, Trustees

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The Opinion of the Court of Appeals on the merits is reported at 247 F.3d 471 (3d Cir. 2001), and it is reproduced in Appendix A at 1a-33a. The Opinion and Order of the United States District Court for the Western District of Pennsylvania granting summary judgment is reported at 80 F. Supp. 2d 510 and reproduced at Appendix B at 34a - 56a.

JURISDICTION

The opinion of the United States Court of Appeals for the Third Circuit was issued on April 13, 2001, in which judgment was entered on said date. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED IN THE CASE

The Worker Adjustment and Retraining Notification Act of 1988 (the WARN Act), 29 U.S.C. §2101 et seq. is attached hereto in Appendix C on pages 57a - 58a.

20 C.F.R. §639.3(a)(2) DOL Reg. states as follows:

> (2) Under existing legal rules, independent contractors and subsidiaries which are wholly or partially owned by a parent company are treated as separate employers or as part of the parent or contracting company depending upon the degree of their independence from the parent. Some of the factors to be considered in making this determination are (i) common

ownership, (ii) common directors and/or officers, (iii) de facto exercise of control, (iv) unity of personnel policies emanating from a common source, and (v) the dependency of operations.

54 Fed. Reg. 16, 045 (Apr. 20, 1989) states as follows:

> The intent of the regulatory provision relating to independent contractors and subsidiaries is not to create a special definition of these terms for WARN purposes; the definition is intended only to summarize existing law that has developed under State Corporations laws and such statutes as the NLRA, the Fair Labor Standards Act (FLSA) and the Employee Retirement Income Security Act (ERISA). The attempt to create new law in this area especially for WARN purposes when relevant concepts of State and federal law adequately cover the issue.

20 C.F.R. §639.1(a) states as follows:

> (a) *Purpose of WARN.* The Workers Adjustment and Retraining Notification Act (WARN or the Act) provided protection to workers, their families and communities by requiring employers to provide notification 60 calendar days in advance of plant closings and mass layoffs. Advance notice provides workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or

retraining that will allow these workers to successfully compete in the job market. WARN also provides for notice to State dislocated worker units so that dislocated worker assistance can be promptly provided.

STATEMENT OF THE CASE

This case arises from the closure of a plastics manufacturing plant, Component Technology Corporation ("Comptech") in Erie, Pennsylvania on October 14, 1994. The plant closed without any prior notification to any of the employees. No attempts were made to provide any prior written notice to the employees until the date of the closure. The case was brought by two former employees, Thomas Pearson and John Kowalkowski, on behalf of the former workers at Comptech ("The Class"). The Class brought this action against General Electric Capital Corporation ("GECC") and Comptech alleging each is an "employer" under the WARN Act. A default judgment was entered against Comptech, which was subsequently placed in involuntary bankruptcy. The issue in this appeal is whether GECC is an "employer" under the WARN Act and thereby responsible for any WARN Act violations.

GECC loaned Comptech over $20 Million Dollars and Comptech defaulted under the terms of the loan. On July 10, 1991, after default, GECC elected a new slate of directors and installed a new management team, including GECC chosen representative, Tom Gaffney. From July 10, 1991, until the plant closure, GECC viewed Comptech as an "investment" as acknowledged by the Third Circuit in this case.

GECC restructured Comptech in 1992. As a result, GECC owned 100% of Comptech's preferred stock, a 100% pledge of Comptech common stock, and GECC had the right to take control of Comptech after the missing of two (2) consecutive dividend payments, which subsequently occurred on June 30, 1994. From the very inception of the transaction, GECC closely monitored and restricted Comptech's activities. Regardless of the identity of the management, GECC

permanently owned 51% in irrevocable warrants on Comptech's common stock, even if the loans were paid off and, therefore, had controlling interest in Comptech from July 10, 1991 onward.

On March 7, 1994, GECC retained an executive search firm, IMCOR, to locate a Chief Executive Officer for Comptech. GECC then forced Comptech to retain IMCOR executive Stuart Benton. On March 14, 1994, Gaffney, after nearly three (3) years of operating Comptech for GECC, outlined Comptech's position to GECC and told GECC that he was "prepared to do whatever G.E. wants relative to Comptech."

In Spring, 1994, GECC met with Comptech representatives and decided that Gaffney should resign. In mid-May, 1994, GECC representative, Jeanette Chen met with Gaffney and instructed him to resign and transfer his stock in Comptech which he agreed to do, although the transaction was not formally effectuated until July 20, 1994.

On May 16, 1994, Charles Villa, Gaffney's replacement, sent a correspondence to GECC outlining Comptech's operations and told them that "G.E. needs to make decisions now" on Comptech and the choice was theirs to make.

On June 15, 1994, 121 days prior to the plant closing, an internal GECC memo decided that Villa "will be in place for a six-month trial basis, during which time GECC will have a call option on his stock and will evaluate whether or not he should remain" and that GECC should hire a "back up" President. According to GECC Vice President, Ed Christie, GECC decided if Villa was doing a proper job and whether he would remain.

On July 20, 1994, Gaffney and Villa backdated a series of legal documents backdating the same to June 22, 1994. Villa paid no price for the stock and made no capital infusion. Villa granted an unconditional stock power to GECC, transferring all of his rights and powers. Villa pledged all stock that he purportedly owned to GECC without recourse to Villa over and above the shares. Villa never had the right to vote the stock. Villa was not permitted to receive dividends. All voting rights were vested in GECC irrevocably. Villa's shares were immediately callable by GECC without any notice or condition through November 30, 1994 to assess Villa. GECC had unfettered, unconditional control of 100% of Comptech's preferred and common stock with all attendant powers, rights, and risks, including liquidation. GECC admitted that they had potential ERISA liability at Comptech in an internal memo. As of July 20, 1994, GECC controlled Comptech through five legal mechanisms: (1) an unconditional stock power over Villa's common stock; (2) "the Villa Call," which was a separate unconditional call; (3) an unconditional bring along call; (4) the right to control as a preferred shareholder; and (5) the right to control Comptech through the loan documents. From June 30, 1994 onward, GECC contemplated the liquidation of Comptech and the ensuing plant closure. In the interim, Comptech defaulted on a second consecutive dividend payment and thereby triggered GECC's right to appoint the Board of Directors.

As of August 27, 1994, Comptech had no cash on hand. Soon thereafter, GECC Vice President, Ed Christie advised Comptech that GECC would not infuse additional capital. In September, 1994, Villa conferred with GECC. During these conversations, the operations of Comptech were discussed, including cash flow, credit hold with suppliers, new and existing customers, various labor needs, funds owed

to GE Plastics, Comptech's lease, a possible relocation and quality control issues.

On September 23, 1994, 21 days prior to the plant closure, during a presentation by Villa, GECC determined that Comptech required at least an additional $1 million capital infusion. Based upon this information, GECC made the formal decision to close Comptech as memorialized in the internal GECC memorandum titled Orderly Liquidation of Comptech. GECC subsequently initiated the liquidation. Christie contacted Villa and asked him to surrender the assets.

On October 12, 1994, GECC swept all Comptech accounts including the payroll account. GECC paid Villa $300,000 to relinquish Comptech's assets through a thinly veiled consulting agreement and the promise not to file bankruptcy. The payment of $300,000 to Charles Villa was expressly required for the execution of all other Asset Turnover Agreements. On October 14, 1994, after reaching terms on his $300,000 Contractor Agreement, Villa turned over all of Comptech's assets to GECC. The employees appeared for work and were told that the plant was closed. No notice. No warning. No preparation for the job loss and attendant financial difficulties.

GECC assigned its rights to a newly incorporated entity, TIFD. On October 14, a notice was finally issued to the 225 Comptech employees. The notice informed the employees that the entire plant was closed immediately and that they were permanently laid off.

The Class filed suit and the United States District Court for the Western District of Pennsylvania granted Summary Judgment in favor of GECC and the Third Circuit affirmed.

REASONS FOR GRANTING THE WRIT

I. There is a Conflict Among the Circuits Concerning the Proper Interpretation of the Worker Adjustment Retraining Notification Act ("WARN Act").

The decision by the Third Circuit in this case is in direct conflict with at least two (2) other Circuits' decisions, particularly, *Adams v. Erwin Weller Co.*, 87 F.3d 269 (8th Cir. 1996) and *Chauffeurs, Sales Drivers, Warehousemen & Helpers Union Local 572 v. Weslock Corp.*, 66 F.3d 241, 244 (9th Cir. 1995). The Third Circuit differs from these Circuits in at least two respects. First, the Third Circuit applied the same test for lenders as affiliated corporations, which these Circuits did not. Second, the Third Circuit limited its affiliated corporation analysis as "employer" under the WARN Act to the DOL regulatory factors only which other Circuits do not.

(a) Lender Cases

In *Chauffeurs, Sales Drivers v. Weslock Corp.*, 66 F.3d 241 (9th Cir. 1995), contrary to the decision of the Third Circuit in this case, the Ninth Circuit applied a separate test for a lender. The Ninth Circuit' s decision was consistent with the decision of the Third Circuit as both Circuits determined that a secured lender can be a WARN Act employer, but the Ninth Circuit applied a different test. The Ninth Circuit determined that a secured lender can be liable under the WARN Act when it operates the business enterprise in the "normal commercial sense." *Id* 66 F.3d at 245. Hence, in the Ninth Circuit, there are, in fact, two (2) separate tests for affiliated corporate liability and secured lender liability.

In *Adams*, the Court decided whether a lender's involvement with its borrower's business affairs made the lender an employer under the WARN Act. In the *Adams* case, the lender refused to extend additional credit and the employer then closed their manufacturing plant without giving advance notice to its employees. Consistent with the *Weslock* Opinion, the Eighth Circuit determined that WARN's obligations can apply to a secured lender. *Adams v. Erwin Weller Co.*, 87 F.3d at 271. The test advanced by the *Adams* Court was that a lender may become liable under the WARN Act only when a lender becomes so entangled with its borrower that it has assumed responsibility for the overall management of the borrower's business. *Adams v. Erwin Weller Co.*, 87 F.3d at 272. Essentially, the Eight Circuit adopted the Ninth Circuit's test that a lender became a WARN Act employer when the lender operates the borrower's assets as a business enterprise in the normal commercial sense. *Id.* The Eighth Circuit expressly refused to decide how much operational decision-making it takes for a lender to be treated as a WARN employer because the record in that case did not show the relationship between the lender and employer was anything more than a debtor-creditor relationship.

The Eighth Circuit also determined that a lender's refusal to loan additional working capital to an insolvent and delinquent borrower does not make it an employer for purposes of the WARN Act and as the plaintiffs could not prove that the lender operated the plant as a business enterprise in the normal commercial sense, there was no liability for the lender. *Adams v. Erwin Weller Co.*, 87 F.3d at 273. This directly conflicts with the decision of the Third Circuit in this case, as the Third Circuit expressly pointed out in their decision.

(b) Affiliated Corporation Liability

The Ninth Circuit provided a separate test for affiliated corporation liability under the WARN Act. In *International Brotherhood v. American Delivery*, the Ninth Circuit applied the "single employer" test under the Labor Management Relations Act as set forth in *Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Serv. of Mobile, Inc.*, 380 U.S. 255, 256, 85 S. Ct. 876, 877, 13 L. Ed. 2d 789 (1965). The *American Delivery* Court concluded that it would apply the "single employer" under the WARN Act and the LMRA concurrently. *International Brotherhood v. American Delivery*, 50 F.3d 770, 776 (9th Cir. 1995). The Ninth Circuit synthesized the test to be simply whether the employer structured its relationship with the subsidiary in such a fashion as to control the subsidiary and, at the same time, avoid the parent's obligations under federal law. *Id* 50 F.3d at 776. The Ninth Circuit rejected a multitude of tests set forth in various District Court decisions which also manifests the confusion surrounding affiliated and lender liability under the WARN Act.[1]

The case at hand provides this Honorable Court the unique opportunity to decide both of these issues, once and for all. The Court will have the ability to address the issue of affiliated parent-subsidiary liability under the WARN Act and what the appropriate test is, as well as what the appropriate

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[1]The Ninth Circuit rejected *Local 397 v. Midwest Fasteners, Inc.*, 779 F. Supp. 788 (D.N.J. 1992); *Wholesale and Retail Food Distribution Local 63 v. Santa Fe Terminal Services, Inc.*, 826 F. Supp 326, 334 (C.D. Cal. 1993); *United Mineworkers of America Dist. 2 v. Florence Mining Co.*, 855 F. Supp. 1466, (W.D. Pa. 1994).

test is for secured lender liability. In the current case, GECC, at the very least, wore both the hats of secured creditor and parent corporation, as was discussed by the Third Circuit's decision in this case.

II. The Question Presented is Important.

In the current case, there are two (2) conflicting and competing policy issues before this Court. The first underlying policy issue is the desired limited liability of shareholders and parent corporations for the actions of underlying corporate entities so as to encourage business expansion and entrepreneurship. The second, but certainly at least equally important policy issue, is the protection of the worker in the labor law context and the dependent families affected by such sudden closure. There is a clear conflict of competing policies under any parent-subsidiary analysis or under any lender-borrower analysis, irregardless of which test is applied.

Undoubtedly, the purpose of the Worker Adjustment Retraining Notification Act is to provide protection to workers, their families and communities by requiring employers' notification 60 calendar days in advance or as soon as reasonably practicable under the circumstances. *20 C.F.R. §639.1(a)*. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of business owners to independently rearrange their businesses and even eliminate themselves as employers, be balanced by some protection to the employees from a sudden change in the employment relationship. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 549, 84 S. Ct. 909, 914, 11 L. Ed. 2d 898 (1964).

The insulation of a stockholder from the debts and obligations of his corporation is the norm, not the exception. *N.L.R.B. v. Deena Artware, Inc.*, 361 U.S. 399, 402-403, 80 S. Ct. 441, 443, 4 L. Ed. 2d 400 (1960). Where dominion of a parent is so complete, interference so obtrusive, by the general rules of agency, the parent will be a principal and the subsidiary an agent. *Id.* Where control is less than this, we are remitted to the tests of honesty and justice. *Id.*

The two competing federal policies of limited liability versus employee protect demand this Court's intervention.

There is a great deal of contradiction among the courts concerning the use of various tests to determine WARN Act liability. *See* Cynthia Nance, *Affiliated Corporation Liability Under the WARN Act*, 52 Rutgers L. Rev. 495, (2000) (describing contradictory holdings). This results in unnecessary and inappropriate uncertainty in the courts and a delay in the timely adjudication of WARN Act cases. It is imperative that this Honorable Court provide a clear and definitive test for affiliated corporate liability and lender liability under the WARN Act. Otherwise, the cases will remain in a morass of uncertainty while courts try to sort out various tests that are to be applied.

The resolution of these issues is important to the general public not just the Comptech employees and GECC as contemplated by Chief Justice Taft's comments in *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S. Ct. 422, 423, 67 L. Ed. 712 (1923). Both employers and those representing employees need to know the true status of the law in order to determine whether or not it applies to a given employer and whether or not affected employees should file federal lawsuits to enforce their rights under the WARN Act. The failure to grant a Writ of

Certiorari in this matter will only allow the confusion of the applicable law to continue unfettered and force courts to determine which tests to apply and how to apply them.

The WARN Act is a federal remedial statute which imposes a very specific obligation upon employers. The law throughout the United States must be uniform. A corporation's determination of whether or not there is a WARN Act obligation should not be dictated by which Circuit they are doing business in. This is impracticable and most probably unworkable. In fact, GECC and employers like them, because of all of their nationwide holdings, should agree with the Petitioner that this Court should accept Certiorari because it is in GECC's best interest that uniformity in law of affiliated corporate obligations and lender obligations be applied in all Circuits.

III. The Decision of the Court of Appeals is Erroneous.

The Third Circuit in this case thoroughly discussed the variety of control tests available and noted that many problems arise because of a muddy juris prudence. The Circuit Court specifically noted that the Department of Labor factors do not precisely correspond to any of the established tests for control determination. The Circuit Court settled on a quasi "integrated enterprise" test promulgated by the National Labor Relations Board, which examines four labor-related characteristics of affiliated corporations: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control.

The Circuit Court noted that the "control of labor" prong of the integrated enterprise test may be established either by showing of day-to-day control of labor or by a

showing that the parent was specifically responsible for the labor practice at issue in the litigation, *Citing U.A. Local 343 of the United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465 (9th Cir. 1995).

The Circuit Court noted that the WARN Act was enacted to protect workers and the "wrongdoer" should not escape liability merely because of corporate formalities. The Third Circuit noted that the current trend towards applying multiple tests was manifestly unworkable due to its unnecessary complication and difficulties. The Circuit Court expressly declined to interpret a Department of Labor statement as a directive not to create new law for WARN Act liabilities for affiliated corporations. The Third Circuit interpreted the DOL factors as being all inclusive and thereby de facto interpreted the DOL factors as a new test under Federal Labor Law. This is directly contrary to the expressed instruction of the Department of Labor. *50 Fed. Reg. 16045.*

For example, the Circuit Court reinterpreted the "unity of personnel policies" outlined in the Department of Labor Regulations to be different than the "centralized control of labor relations" from the integrated enterprise test. This is particularly significant in this case because under the integrated enterprise test, the "centralized control of labor relations" can be satisfied upon a showing that the parent directed the subsidiary to institute the policy at issue, in this case, the plant closure. The Third Circuit interpreted "unity of personnel policies" as requiring the plaintiff to establish that the separate corporations actually function as a single entity on a regular day-to-day basis, a much more difficult test than the "centralized control of labor relations" prong of the integrated enterprise test.

The Third Circuit interpreted the "common management" prong of the integrated enterprise test as being broader than the "common officers and/or directors" test under the Department of Labor factors. Again, this is a more difficult test for plaintiffs to meet.

The Third Circuit then contracted and thereby de-emphasized a series of other factors under the "de facto exercise of control" factor in the Department of Labor test. This "lumping" deemphasizes very important facts such as the implementation of the labor policy at issue. The analysis of "de facto control" is watered down by using "lender rights" to tip the scale in this particular case. Particularly important in this case was the direct exercise of control under the particular policy at issue which, in this case, is the plant closure. The Third Circuit also considered whether or not the two companies operated at "arms length," which GECC and Comptech clearly did not in the current case in light of GECC's position of controlling shareholder.

Although the Circuit Court heavily relies upon the "integrated enterprise" test, it does not actually implement this test verbatim. It, therefore, created a new test under the WARN Act for affiliated corporation liability, contrary to the Department of Labor edict.

The Circuit Court then proceeded to state that it will not apply a separate test for lender liability under the WARN Act, but then proceeded to do so. The Circuit Court asserted it would apply the DOL factor to lenders, but then re-emphasized that Courts should take special note of the relationship between a lender and a borrower. The Circuit Court concedes that the application of the factors is a factual question. The Circuit Court concedes that GECC and Comptech were not at an arms length transaction in its

"common ownership" analysis. The Circuit Court concluded that the plaintiffs have satisfied the common ownership test, but then asserts that there were not common directors and/officers and it more strictly interprets the WARN Act prong of "common directors as officers" than the "common management" prong of the integrated enterprise test. Again, this is a specific instance of applying a new test under the WARN Act and the test is more difficult to meet by plaintiffs despite WARN's remedial purpose.

The Court analyzed the "unity of personnel policies" as requiring day-to-day management, which is much stricter than the integrated enterprise test "control of labor" prong, which can be satisfied by showing that the parent was specifically responsible for the labor practice at issue. If the Circuit Court concludes that GECC was in fact a parent, this prong is clearly satisfied under the integrated enterprise test.

The Court noted the inconsistencies in the evidence submitted by GECC and rejected the unity personnel policies despite the fact that GECC hired and fired the company's Chief Executive Officer, President and Controlling Shareholder, Tom Gaffney.

With regard to "dependency of operations," again, the Circuit Court demands day-to-day control and ignores the reality of control accompanied by implicit threats at the policy making level. The Court acknowledged that GECC had the right to remove Villa, the company president, at will. The Court then analogized the case to the Eleventh Circuit's decision in *Citibank N.A. v. Data Lease Financial Corp.*, 828 F.2d 686 (11th Cir. 1987) and analyzed GECC as a creditor and asserted that the fact that it was a parent of Comptech was irrelevant. The Third Circuit chose lenders' rights over workers' rights irregardless of the lender owned company.

Theoretically, to skirt federal labor law, a parent corporation need only execute a series of loan documents between parent and subsidiary to get special "lender" treatment under the WARN Act.

Finally, in the Court's analysis of "de facto exercise of control," the Court did a "lender" analysis. GECC was the owner of Comptech and, hence, any lender analysis is inappropriate due to the lack of an arms length relationship. The Court acknowledges that Comptech was kept operational by GECC's decision to hold Comptech as an investment. With ownership comes operational risk, both upside and downside. Among the downside risks are the exposure to Federal Labor Law liability. A corporation cannot both control for all other purposes other than labor law. Either there is control or not.

The Circuit Court stated, "while the demarcation is not clear, indeed it is quite close, we think it falls on GECC's side of the line." This is directly contrary to the mandates of Federal Rule of Civil Procedure 56. If it is a "close call," as the Third Circuit states, the plaintiffs, as non-moving parties, are entitled to the inference, not the moving parties, GECC.

The Court ignores plaintiffs' expert banking witness, Thomas Myers. The Court rejects Myers' affidavit despite performing a lender liability analysis in the "de facto exercise of control" and the "dependency of operations" analysis. The Third Circuit's analysis of these two prongs made Myers' affidavit relevant to the case. Myers' affidavit was excluded by the District Court without the benefit of a Daubert

hearing.[2]

There can be no legitimate contention that GECC did not close the Comptech plant. Weak attempts at reliance upon corporate formality and asserting their status as a "lender" should give this Court pause in light of the remedial nature of the WARN Act. If this Court determines that GECC did not close the plant, form triumphs over substance. At the very least, this is a factual inquiry that should have been submitted to the jury for conclusion.

Rather than following the express directive from the Department of Labor, the Third Circuit chose to essentially interpret the DOL factors as new law and rejected other tests under ERISA and the "single enterprise test." In light of this Honorable Court's decision in *Chevron v. National Resource Defense Counsel*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) and *K-Mart v. Cartier, Inc.*, 486 U.S. 281, 108 S. Ct. 1811, 100 L. Ed. 2d 313 (1988), the Third Circuit must give deference to the DOL's interpretation of the WARN Act and, instead, supplanted its interpretation. The Third Circuit did not follow this Court's holding in *Chevron*.

The determination of whether a parent can be held liable for the acts of its subsidiary is a fact-specific inquiry. It is true that the mere existence of a parent-subsidiary relationship does not provide a basis for holding a parent liable. *American Bell, Inc. v. Federation of Tel. Workers*, 736 F.2d 879, 887 (3d Cir., 1984). However, there is more than a parent-subsidiary relationship in the case at hand.

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[2]Contrary to the District Court and the Circuit Court's holding, a Daubert hearing should have been held to determine whether or not Myers' testimony was admissible.

The jury should have been permitted to read the documents submitted by the Plaintiffs, listen to the live testimony, and consider the arguments of counsel. The Circuit Court exceeded its realm of authority in drawing and concluding fact inferences, which is the province of the jury.

Villa, Gaffney and Benton were agents of GECC. This issue was never fully addressed and was incorrectly rejected by the Third Circuit. In Pennsylvania, the basic elements of agency are manifestation by principal that agent shall act for him, agent's acceptance of undertaking and understanding of parties that principal is to be in control of undertaking. *Scott v. Purcell*, 415 A.2d 56, 60, (Pa. 1980). At the very least, the issue of whether Villa, Gaffney and Benton were the agents of GECC is a question for the trier of fact and The Class should have been granted the opportunity to present their case to the jury.

Contrary to the Circuit Court holding, GECC had de facto control: (1) GECC had unconditional voting rights without default on 100% of Comptech's stock; (2) GECC removed Gaffney from Comptech; (3) GECC closed Comptech's facilities; (4) GECC instructed Gaffney to transfer his shares to Villa; (5) GECC indemnified Gaffney; (5) Irregardless of default, GECC always had the unconditional right to vote 51% of Comptech's common stock; and (6) GECC's unrefutable control as of July 10, 1991; (7) GECC's discretionary right to remove President Villa at will; and (8) the totality of involvement in Comptech's activities.

The goal of the WARN Act statute to protect workers. GECC is the true wrongdoer in this case. GECC should not escape liability simply because they observed some, but certainly not all, corporate formalities. GECC should be

found directly liable as a parent company of Comptech.

As discussed herein, there are a myriad of tests promulgated by many Courts. The proper test is the actual "integrated enterprise test," plus the additional "de facto exercise of control" test promulgated by the Department of Labor. This differs from the test applied by the Third Circuit in this case. The Third Circuit proffered a quasi - "integrated enterprise" test, but rose the bar for plaintiffs in WARN Act cases. The "integrated enterprise plus" test is the fairest and most effectuates the intent of the statute.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED:

Date: July 9, 2001

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No.: 00-3056

THOMAS PEARSON; JOHN KOWALKOWSKI, on behalf of themselves and all others similarly situated,
Appellants

v.

COMPONENT TECHNOLOGY CORPORATION a/k/a COMPTECH; GENERAL ELECTRIC CAPITAL CORPORATION; TIFD VIII-R, INC.;

THOMAS P. AGRESTI, ESQ.; KENNETH CHESTEK,
Trustee

On Appeal from the United States District Court
For the Western District of Pennsylvania
(D.C. Civ. No.: 94-cv-00293)
District Judge: Honorable Maurice B. Cohill, Jr.

Argued: October 24, 2000

Before: BECKER, *Chief Judge,* SCIRICA and FUENTES, *Circuit Judges.*

(Filed: April 13, 2001)

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OPINION OF THE COURT

BECKER, Chief Judge.

The Worker Adjustment and Retraining Notification Act of 1988 (the WARN Act), 29 U.S. C. §2101 et seq. mandates that employers provide workers with 60 days' notice (subject to certain exceptions not at issue in this appeal) prior to a plant closing or mass layoff, and allows various remedies for workers when closures are not preceded by the requisite notification. Because a plant closure often presages a corporations' demise, leaving workers with no source of satisfaction from their employer, plaintiffs have frequently sought damages from affiliated corporations. In a parallel series of cases, plaintiffs with claims arising from non-WARN Act sources of law against debt-laden or bankrupt corporations have occasionally attempted to sue the corporations' major secured lenders, on the theory that the lenders have exercised such control over the corporations that veil-piercing is appropriate. This case implicates both lines of precedent.

The question before us is whether the former employees of Component Technology (CompTech), a now-defunct company, have set forth sufficient evidence to create a genuine issue of material fact as to whether, under standards we must fashion for this Circuit, CompTech's major secured lender, General Electric Capital Corporation (GECC), should incur WARN Act liability for CompTech's unnoticed plant closure. This question, in turn, requires us to consider not

only the prerequisites for parent/subsidiary liability in the WARN Act context (as will be shown, that jurisprudence is apposite here), but also whether the prerequisites change in the context of lender/borrower relationships.

The Department of Labor (DOL) has issued a regulation setting forth relevant factors for courts to use when considering whether to impose WARN Act liability on a parent corporation. *See* 20 C.F.R. §639.3(a)(2). These factors closely resemble, but do not precisely mirror, the "single employer" or "integrated enterprise" test, frequently utilized for similar purposes in labor and employment law. The Department has also issued a statement explaining its intention that jurisprudence under the WARN Act not deviate from "existing law" with regard to liability for affiliated corporations. *See* 54 Fed. Reg. 16,045 (Apr. 20, 1989). The tension between "existing law" and the courts as to the appropriate standards to apply for WARN Act veil-piercing. *Compare United Paperworkers Int'l Union v. Alden Corrugated Container Corp.*, 901 F. Supp. 426, 436-39 (D. Mass. 1995), with *Wholesale & Retail Food Distrib. Local 63 v. Santa Fe Terminal Servs., Inc.*, 826 F.Supp. 326, 334-35 (C.D. Cal. 1993). To further compound the problem, when it comes to lenders rather than parents to hold lenders liable for their borrowers' actions; usually, some version of the "alter ego" or "instrumentality" test for liability is used, often with an especial vigor. These tests are far less hospitable to plaintiffs than labor law's "integrated enterprise" test, and, apparently, than the Department of Labor factors. Thus, the law is presently unsettled as to the proper test for liability under the WARN Act, and as to the significance for WARN Act purposes of an affiliated corporation's status as "lender" or "parent."

In this case, GECC loaned large sums of money to CompTech, and CompTech fell into default. Exercising its rights under the loan agreements, GECC voted CompTech's stock and installed a new slate of directors and a new Chief Executive Officer, to whom title of the stock was transferred. For the next few years, GECC and CompTech maintained a close relationship as CompTech struggled to survive as a going concern; when CompTech finally was unable to turn a profit, GECC declined to provide further cash infusions. CompTech , unable to secure new financing, collapsed and shut down its operations without giving WARN Act notice. A class of former CompTech employees have now brought suit against GECC under the WARN Act.

We conclude that the appropriate test to employ under the WARN Act for affiliated corporate liability is the multi-factored test promulgated by the DOL. We believe that the DOL's instruction that courts apply "existing law" to questions involving intercorporate liability was not intended to undermine the force of its own regulation on the subject, but was instead intended to instruct courts that existing precedent applying other tests (such as the "integrated enterprise" test) may be useful and appropriate to resolve a analogous questions arising under the WARN Act. We also observe that the regulation indicates that the listed factors are not an exhaustive list, which we interpret as a reminder that the test is one of balancing, and that, as with any balancing test, a number of circumstances not specifically enumerated may be relevant.

We must also determine whether GECC's initial status as a secured lender affects the test we choose to employ for under the appropriate test, the District Court erred in

concluding that plaintiffs had not put forth sufficient evidence to create a genuine issue of material fact as to separating "parents" from "lenders" are not often bright ones, the simpler approach is to apply the same test for liability regardless of the formal label the corporations have attached to their association. Our conclusion is strengthened by our recognition that determining liability by reference to whether a lender has behaved in a "typical" manner, as did the District Court in this case, carries with it the risk of unintentionally altering what is "typical," as lenders structure their relationships with borrowers to respond to the practices that we ourselves have proclaimed "typical." Therefore, we take a more functional approach to determining whether or not to "pierce the veil" under WARN by focusing on the nature and degree of control possessed by one corporation over another; in so doing, however, particular weight must be accorded, where applicable, to a lack of ownership interest between corporations.

Applying the DOL factors to the circumstances presented in this case, we hold that even if GECC did, in the course of its relationship with CompTech, technically become a "parent" corporation, its actions never reached the point where even a more conventional parent would become liable. Therefore, the District Court's grant of summary judgment to GECC was proper, and we will affirm the judgment.

I. Facts and Procedural History

Component Technology, a Delaware corporation with headquarters in Erie, Pennsylvania, was a custom injection molder whose business was to manufacture plastic objects in accordance with corporate customers' specifications,

principally in the business machine and medical produces markets. R&R Plastics (R&R) was, at the time, a wholly-owned subsidiary of CompTech.

In June 1989, CompTech was poised to enter into a profitable new arrangement with Kodak, whereby CompTech would manufacture plastic components for a revolutionary new photocopier. In anticipation of the capital expansion that the venture would require, CompTech sought and obtained a $25,000,000 loan from GECC. The loan was formally structured as a loan to the Chicago company formed for the purpose of acquiring CompTech. As security for its loan, GECC received pledge agreements for all of the stock in Chicago Plastics, CompTech, and R&R, including the right to vote the stock in the event of a default.

Shortly after Chicago Plastics purchased CompTech, the Kodak project was canceled due to "technical obsolescence." CompTech's business immediately faltered, resulting in default on the GECC loan in 1991. GECC exercised its rights under the pledge agreements and voted its stock to install new boards of directors of the three corporations. The new directors, in turn, chose new corporate officers. On July 10, 1991, GECC hired a consultant with experience in the plastics industry, Thomas Gaffney, to serve as Chief Executive Officer of Chicago Plastics, CompTech, and R&R.

At some point in late 1991 or early 1992, GECC Vice-President Jeanette Chen began to manage the CompTech account. In March, she drafted an internal credit memorandum outlining a proposed strategy to restructure CompTech's loans. The memo explained that for GECC to

"[m]aximize debt recovery" it would need to "hold[] investment for sufficient time period to implement merger/acquisition strategy, rebuild customer base, and return Company to profitability." Pursuant to the recommendations contained in the memo, GECC wrote of $20,000,000 of CompTech's debt and restructured the remaining debt as term loans of $3,500,000, a revolving line of credit of $3,500,000, and nonvoting preferred stock of $4,000,000.

GECC then renewed its agreement with Gaffney and arranged for a private foreclosure sale of CompTech's stock from Chicago Plastics. The stock was sold to Component Technology Acquisition Company (Acquisition), a wholly-owned subsidiary of Component Technology Holding Corporation (Holdings). Acquisition was then merged into CompTech. Sixty percent of the stock in Holdings was transferred to Gaffney; forty percent was transferred to Richard Brooks, the newly-appointed president of Comptech. GECC retained a pledge on all of the Comptech common stock, and neither Gaffney nor Brooks paid any compensation for their stock. As part of the consulting agreement, GECC indemnified Gaffney for all liabilities (other than misconduct) arising out of his duties as CEO of the companies and as shareholder of Holdings.

As a final step in the restructuring outlined in the Chen memo, Comptech acquired a plastics company known as Accuform and merged it with R&R. Thus, after these maneuvers, all of Comptech's stock was owned by a single holding company, Holdings, which, in turn, was owned by Gaffney and Brooks. Gaffney, the CEO of Comptech , was under contract to GECC to run the company, and had been indemnified by GECC for liabilities arising both out of his

activities as CEO and his activities as a shareholder.

The loan agreement, together with the $4,000,000 worth of nonvoting preferred stock held by GECC, provided GECC with a considerable amount of control over Comptech's finances. The loan agreement and GECC's stock ownership entitled GECC to receive certain scheduled payments and, overall, to vote in new directors and assume control of Comptech until the deficiency was paid. No dividends could be paid on common stock until GECC had received its preferred payments. Without prior authorization from GECC, Comptech was forbidden to engage in stock reorganization, lending or borrowing, mergers or assets encumbered by liens securing GECC loans. Further, GECC retained the right to approve any employee salaries in excess of $100,000 per year – a restriction apparently intended to enable GECC to monitor the hiring of key personnel. Finally, GECC received warrants on 75% of Comptech's stock, 24% of which were to be gradually returned to Comptech as the loans were repaid, although there is no indication in the record of when, if ever, the remaining 51% were to be relinquished. As it turned out, Comptech was only able to pay a single dividend to GECC, in 1993, by using monies drawn from the revolving line of credit.

As Comptech continued to operate wit the new loans in place, GECC exercised continuing oversight of its finances pursuant to the loan agreement, occasionally agreeing to waive penalties and extend further loans to the cash-strapped company. Comptech, in accordance with the agreement, sought approval of a number of its decisions, including executive compensation and benefits, and the updates concerning its financial condition. GECC's approval was

required when Comptech sought to create a Mexican subsidiary to service one of its customers, and in connection with the deal, GECC waived its security interest in relevant equipment, receiving in return a pledge on all of the stock owned by Comptech in the new venture.

In early 1994, Comptech sold R&R, and the proceeds of the sale were used to prepay GECC in accordance with the terms of the loan agreement. Later that year, Gaffney wrote to GECC outlining Comptech's current status and its proposed projects, seeking approval for those proposals relating to the Accuform acquisition. The letter concluded by saying "We need to know what G.E. Wants us to do. We are proceeding with items, 2, 3 and 4, but we need to get confirmation from G.E. on each one of these items. Obviously, without G.E.'s help we cannot proceed to compete our plans. I am prepared to do whatever G.E. wants relative to Comptech."

The next month, GECC determined that as CEO of Comptech, Gaffney was too focused on "grandiose schemes" for the company and spent too little time on the day-to-day operations. According to the deposition of GECC Vice-President Ed Christie, it was for this reason GECC elected not to renew Gaffney's contract and asked him to step down as CEO. Gaffney had recently fired Brooks as president and replaced him with Charles Villa; GECC chose to hire Villas as the new president and CEO. In order to transfer power from Gaffney to Villa, both Gaffney and Brooks sold their stock back to Holdings for a nominal price, and Holdings reissued the stock to Villa. Villa then pledged the shares to GECC, and granted GECC the unconditional power to transfer and assign the stock.

At some point after the plans for these transfers had been laid, but before the shift in ownerships had actually taken place, Villa sent a letter to Chen detailing the current status of Comptech's attempts to resuscitate its business and requesting GECC's further support to finance its growth and upgrade its facilities. The letter concluded by stating that "G.E. needs to make decisions now on all the issues outlined in this memo. How you respond will then dictate what the management of COMPTECH will need to do to accomplish the task at hand. We can either move forward in an aggressive, systematic approach to take advantage of industry dynamics and market windows available now or we can remain stagnant and loose [sic] any competitive edge that may exist resulting in a slow death of a one-time INDUSTRY LEADER. The choice is yours to make."

When the stock transfers finally were completed in late June 1994, a number of new rights were granted to GECC. At any time within the first six months, GECC could force Villa to sell his shares to GECC for the same nominal amount that he had paid (the Villa Call). Further, at any time – either before or after the first six months – GECC could force Villa to sell a portion of the stock for value, either to GECC or to a GECC designee (the Bring-Along Call). The purpose of the Villa Call was to enable GECC to "assess Villa's abilities on a trial bases," and, should he prove to be unsatisfactory, easily transfer the shares to a new president. The stated purpose of the Bring-Along Call was to allow GECC to sell Comptech if it so chose. Villa, as the stockholder, had the right to vote the shares so long as Comptech stayed current with loan payments; however, it appears that Comptech was in default either at the time of the transfer or shortly thereafter, so that in fact, GECC at all times possessed the

voting rights. GECC acknowledged in its internal memoranda that, as a result of these options, it was potentially responsible for the company's liabilities under the Employee Retirement Income Security Act of 974 (ERISA), 29 U.S.C. §1001 et seq. However, because by this time Comptech had frozen its benefits plans and could not create new ones without GECC approvai, there was not risk that GECC would involuntarily become liable for payments under ERISA.

Simultaneous with the stock transfer, GECC requested that Comptech hire Stuart Benton as an industry consultant to "help assess the Company's ongoing cash needs and determine an appropriate account strategy for "backup" president should Villa fail to meed GECC expectations. Although Benton was formally under contract to Comptech, several Comptech employees testified in deposition that they understood him to be a GECC representative.

Benton observed the Comptech operation for the next few months, under the plant closed. Deposition testimony from Comptech's upper-level managers demonstrates that although he occasionally made suggestions to the managers, Benton largely worked with Villa and did not direct or interfere with the duties of th either management personnel. None of the upper-level managers, including Villa, reported any attempts by GECC to control Comptech's operations, through Benton or through anyone else. Other than the financial controls and stock interests described above, GECC had no formal authority to control Comptech's business decisions, including its strategic planning, its relationships with clients, its marketing, its product selection, its product design, or its quality control.

By August 1994, Comptech was contemplating a plant closure, going so far as to contact its attorneys to inquire about its WARN Act obligations. In September 1994, Comptech informed GECC that it would require further outlays to continue operations though the end of the year. Comptech also sought financing from Citibank financings if GECC continued to do so as well. GECC refused to provide further funds, either with or without Citibank's participation, and, on September 30, Chen drafted an internal memorandum sketching out a proposal for an "orderly liquidation" of the company. Negotiations for Comptech's liquidation began in October 1994, and on October 14, 1994, employees were formally notified of the plant closing, effective immediately.

The former employees of Comptech filed this action against GECC in the District Court for the Western District of Pennsylvania on November 2, 1994. On December 17, 1999, after discovery, the District Court granted GECC's motion for summary judgment to in the ground that the plaintiffs had failed to demonstrate that GECC, as a lender, had "exhibit[ed] such a high degree of control over the debtor corporation" so as to become an "employer" within the meaning of the WARN Act. *Pearson v. Component Tech. Corp.*, 80 F. Supp.2d 510, 518 (W.D. Pa. 1999). The court also rejected the plaintiffs' attempts to argue for veil-piercing liability based on GECC's status as a parent corporation of Comptech, reasoning that GECC was not a parent and that its actions were "consistent with its role as Comptech's secured creditor." *Id.* at 523.

On appeal, the plaintiffs argue that: (1) GECC was an employer within the meaning of the WARN Act as a matter of law by virtue of its ownership of Comptech stock operation;

and (2) GECC was a parent corporation of Comptech under circumstances justifying veil-piercing under WARN Act standards. The District Court had jurisdiction pursuant to 28 U.S.C. 1331, and we have plenary review over a District Court's grant of summary judgment. *See Coolspring Stone Supply, Inc. v. American States Life Ins. Co.*, 10 F.3d 144, 146 (3d Cir. 1993). We set forth the familiar summary judgment standard in the margin.[3]

II. Liability for Affiliated Corporations Under the WARN Act

A. Introduction

In the wake of numerous plant closings and mergers in the 1970s and 1980s, Congress passed the WARN Act. *See Hotel Employees & Rest. Employees Int'l Union Local 54 v. Elsinore Shore Assocs.*, 173 F.3d 175, 182 (3d Cir. 1999). The Act was intended to protect workers by requiring that companies with advance knowledge of an imminent closing provide notice to employees, so as to allow "workers and their families some transition time to adjust to the prospective

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[3]Summary judgment is proper if there is not genuine issue of material fact and if, viewing the facts in the light most favorable to the non-moving party, the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*. 477 U.S. 317, 322 (1986). At the summary judgment stage, the judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market." 20 C.F.R §639.1(a). Thus, the Act state that:

> An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order . . . to each representative of the affected employees as of the time of the notice or, if there is not such representative at that time, to each affected employee. . . .

29 U.S.C. §2101(a)(1)

The Act defines an employer as "any business enterprise" that employs 100 or more employees. *Id.* §2101(a). Employers violating the Act are liable for backpay and back benefits. *See Id.* §2104(a). Thus, the question presented by this litigation is whether, under these facts, GECC was the plaintiffs' employer. In order to make such a showing, the plaintiffs must establish GECC to be a single "business enterprise" with Comptech such that it is responsible for Comptech's WARN Act obligations.

The question when affiliated corporations will be considered a single employer for WARN Act purposes tends to arise in two contexts: (1) when plaintiffs seek to impose liability for violation s on affiliates of insolvent corporations, *see, e.g., Local 397, Int'l Union of Electronic, Elec. Salaried Mach & Furniture Workers v. Midwest Fasteners, Inc.*, 779 F. Supp. 788 (D.N.J. 1992); and (2) when plaintiffs seek to establish that two or more affiliated corporations should be

viewed as a single enterprise in order to meet the 100 employee WARN Act threshold, *see, e.g., Watts v. Marco Holdings, L.P.*, No. 3:95CV88-B-A, 1997 WL 578783 (N.D. Miss. Aug. 8, 1997). The WAR act itself does not address such situations, but the Department of Labor regulations issued under the Act provide that:

> Under existing legal rules, independent contractors and subsidiaries which are wholly or partially owned by a parent company are treated as separate employers or as a part of the parent or contracting company depending upon the degree of their independence from the parent. Some of the factors to be considered in making this determination are (i) common ownership, (ii) common directors and/or officers, (iii) de factor exercise of control, (iv) unity of personnel policies emanating from a common source, and (v) the dependency of operations.

20 C.F.R. §639.3(a)(2). The five factors will hereinafter be referred to as the "DOL factors."

The Department of Labor's "supplementary information" regarding its WARN Act regulations explains that:

> The intent of the regulatory provision relating to independent contractors and subsidiaries is not to create a special definition of these terms for WARN purposes; the definition is intended only to summarize existing law that has

> developed under State Corporations laws ans such statutes as the NLRA, the Fair Labor Standards Act (FLSA) and the Employee Retirement Income Security Act (ERISA). The attempt to create new law in this area especially for WARN purposes when relevant concepts of State and federal law adequately cover the issue.

54 Fed. Reg. 16,045 (Apr. 20, 1989).

The intersection of the regulatory factors and the supplementary information has created considerable confusion among courts searching for a single test to determine the status of affiliated corporations. *See* Cynthia Nance, *Affiliated Corporation Liability Under the WARN Act,* 52 Rutgers L. Rev. 495, 535-36 (2000) [hereinafter Nance, WARN act] (describing contradictory holdings). The problem arises because the jurisprudence contains several tests for depending on whether the cause of action accrues under state or federal law, as well as on the particular type of claim at issue. Further, the DOL factors do not precisely correspond to any of the established tests for such determinations. Courts examining affiliated corporations under the WARN Act have often applied two or more tests, purporting to "average" the results, usually without any systemative method for doing so. *See, e.g., United Paperworkers Int'l Union v. Alden Corrugated Container Corp.*, 901 F. Supp. 426, 436-39 (D. Mass. 1995) (conducting, *inter alia*, a state alter ego test, but ultimately jettisoning the results on the ground that federal liability standards should not turn on state protections for corporations).

A further complication comes from the fact that we have before us in this case not the traditional parent/subsidiary relationship but a relationship that began as an arrangement between a secured lender and a borrower – a situation unaddressed by either the Act or the regulations. Thus, we must determine whether the "standard" WARN Act test – whatever test that might be – is even applicable under these circumstances. To that end, we will first briefly sketch some of the methods available for determining intercorporate WARN Act liability, ultimately concluding that rather than simply choosing one of the "established" tests and importing it to the WARN Act context, the appropriate test is the one specifically delineated in the DOL regulation. We further conclude that the supplementary information provided by the Department of Labor was not intended to encourage courts to choose a different test, but was merely intended to clarify that courts may draw on concepts in existing precedent when interpreting and applying the DOL factors. We will then turn to the question whether the DOL factors should apply to situations involving lenders rather than parents, ultimately concluding that the factors should be the same for both.

B. Liability Between Parents and Subsidiaries

1. Traditional Veil-Piercing Theories

The corporate form was created to allow shareholders to invest without incurring personal liability for the acts of the corporation. These principles are equally applicable when the shareholder is, in fact, another corporation, and hence, mere ownership of a subsidiary does not justify the imposition of liability on the parent. *See United States v. Bestfoods,* 524, U.S. 51, 69 (1998); *American Bell Inc. v. Federation of Tel.*

Workers of Pa., 736 F.2d 879, 887 (3d Cir. 1984). Nor will liability be imposed on the parent corporation merely because directors of the parent corporation also serve as directors of the subsidiary. *See Bestfoods*, 524 U.S. at 69. However, under both state and federal common law, abuse of the corporate form will allow courts to employ the "tool of equity" known as veil-piercing, i.e., disregard of the corporate entity to impose liability on the corporation's shareholders. *Publicker Indus., Inc. v. Roman Ceramics Corp.*, 603 F.2d 1065, 1069, (3d Cir. 1979). Courts have held veil-piercing to be appropriate "when the court must prevent fraud, illegality, or injustice, or when recognition of the corporate entity would defeat public policy or shield someone from liability for a crime," *Zubik v. Zubik*, 384 F.2d 267, 272 (3d Cir. 1967), or when "the existence," *New Jersey Dep't of Ervtl. Prot. v. Ventron Corp.*, 468 A.2d 150, 164 (N.J. 1983).

The Third Circuit alter ego test is fairly typical of the genre.[4] It requires that the court look to the following factors:

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[4]Although the tests employed to determine when circumstances justifying "veil-piercing" exist are variously referred to as the "alter ego," "instrumentality," or "identity" doctrines, the formulations are generally similar, and courts rarely distinguish them. *See* Phillip I. Blumberg, *The Law of Corporate Groups: Substantive Law* §6.01, at 111 (1987). The most important differences across jurisdictions seem to reside largely in two aspects of these different formulations: first, whether an element of "fraudulent intent," inequitable conduct, or injustice is explicitly required, *see id.* §6.02, at 115, and second, a general sense that federal courts are more likely to pierce the veil in order to effectuate federal policy, lest state corporate laws be permitted to

gross undercapitalization, failure to observe corporate formalities, nonpayment of dividends, insolvency of debtor corporation, siphoning of funds from the debtor corporation by the dominant stockholder, nonfunctioning of officers and directors, absence of corporate records, and whether the corporation is merely a facade for the operations of the dominant stockholder. *See American Bell*, 736 F.2d at 886. Other (similar) formulations are set forth in the margin.[5]

The test, whether or not a particular version requires an element of fraudulent intent, *see supra* note 2, is demonstrably an inquiry into whether the debtor corporation is little more than a legal fiction. Such a burden is notoriously difficult for plaintiffs to meet. For instance, courts have refused to pierce the veil even when subsidiary

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frustrate federal objectives, *see Anderson v. Abbott*, 321 U.S. 349, 365 (1944); *United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1092 (1st Cir. 1992).

[5]For comparison, the Massachusetts version requires consideration fo common ownership, pervasive control, intermingling of activity and assets, undercapitalization, lack of corporate formalities, absence of records, nonpayment of dividends, insolvency at the time of the relevant transaction, siphoning of corporate assets by shareholders, nonfunctioning offers and directors, use of the corporation for the transactions of dominant shareholders, and use of the corporation for fraud. *See Evans v. Multicon Constr. Corp.*, 574 N.E.2d 395, 398 (Mass. App. Ct. 1991). The Illinois version considers the failure to maintain records and formalities, commingling of funds, undercapitalization, an done corporation treating the assets of the other as its own. *See Van Dorn Co. v. Future Chem. & Oil Corp.* 753 F.2d 565, 570 (7th Cir. 1985).

corporations use the trade name of the parent, accept administrative support from the parent, and have a significant economic relationship with the parent. *See, e.g. Jackson v. General Elec. Co.*, 514 P.2d 1170 (Alaska 1973). Thus, in order to succeed on an alter ego theory of liability, plaintiffs must essentially demonstrate that in all aspects of the business, the two corporations actually functioned as a single entity and should be treated as such. *See RRX Indus., Inc. v. Lab-Con, Inc.*, 772 F.2d 543, 545 (9th Cir. 1985) (veil-piercing is appropriate when "the personalities of the corporation and individual are no longer separate"); *Akzona Inc. v. E.I. DuPont De Nemours & Co.*, 607 F.Supp. 227, 237 (D. Del. 1984) (a subsidiary is an alter ego or instrumentality of the parent when "the separate corporate identities . . . are a fiction and . . . the subsidiary is, in fact, being operated as a department of the parent").

2. "Integrated Enterprise" Test

Veil-piercing doctrine has been criticized for employing the same formulations of the test across the different contexts in which plaintiffs seek to impose liability. *See Substantive Law* §6.01m at 107-08 (1987); *cf. William H. Lawrence, Lender Control Liability: An Analytical Model Illustrated with Applications to the Relational Theory of Secured Financing*, 62 S. Cal. L. Rev. 1387, 1388 (1989) [hereinafter Lawrence, Lender Control Liability] (criticizing the use of similar "indicia of control" for lender liability cases regardless of context). It is often argued that because public policy varies from contract to tort to property, for example, veil-piercing standards should vary as well. *See, e.g., Robert B. Thompson, Piercing the Corporate Veil: An Empirical Study*, 76 Cornell L. Rev. 1036 (1991). These concerns have

been partially addressed through the "integrated enterprise" test for the presence of a single employer, a sort of labor-specific veil-piercing test, first developed by the National Labor Relations Board.

Because the Board was concerned only with labor law and policy, it developed a test for corporate "sameness" that, likewise, concerned itself only with those aspects of corporations having a direct relevance to labor relations. So, for example, the integrated enterprise test is not concerned with such traditional alter ego hallmarks as "nonpayment of dividends," because such aspects of a corporation's finances are not as directly related to management's labor policy as are other aspects of corporation functioning. *See Nance, WARN Act, supra. at 533.* Rather, the test looks to four labor-related characteristics of affiliated corporations: interrelation of operations; common management; centralized control of labor relations; and common ownership or financial control. *See, e.g., Radio & Television Broad. Techs. Local Union 1264 v. Broadcast Serv. of Mobile*, 380 U.S. 255, 256 (1965) (per curiam). No single factor is dispositive; rather, single employer status under this test "ultimately depends on all the circumstances of the case." *NLRB v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117, 1122 (3d Cir. 1982).

As originally designed, the integrated enterprise test was used by the National Labor Relations Board to determine whether two firms were sufficiently related to meet its jurisdictional minimum amount of business volume. *See Stephen F. Beford, Labor Law and the Double-Breasted Employer: A Critique of the Single Employer and Alter Ego Doctrines and a Proposed Reformulation*, 1987 Wis. L. Rev. 67, 75. Later, the Board came to use the same test to

determine whether nominally separate firms constituted "neutral" entities in the context of secondary bycotts, and "double-breasted" operations so as to avoid the obligations of a collective bargaining agreement. *See id.* At 75-76.[6]

Since its initial formulation, the test has been applied by courts in other employment contexts, including the Labor Management Relations Act, *see International Bhd. of Teamsters Local 952 v. American Delivery Serv. Co., Inc.* 50 F.3d 770 (9th Cir. 1995); Title VII and the age Discrimination in Employment Act, *see Frank v. U.S. West, Inc.*, 3 F.3d 1357 (10th Cir. 1993); the Americans with Disabilities Act, *see EEOC v. Chemtech Int'l Corp.*, 890 F. Supp. 623 (S.D. Tex. 1995); and the Fair Labor Standards Act, *see Takacs v. Hahn Auto. Corp.*, No. C-3-95-404, 1999 WL 33117265 (S.D. Ohio Jan. 4, 1999). But *see Papa v. Katy Indus., Inc.*, 166 F.3d 937, 940-43 (7th Cir. 1999) (rejecting the integrated enterprise test in the context of (rejecting the integrated enterprise test in the context of antidiscrimination law). Department of Labor regulations have also adopted the integrated enterprise test for the Family Medical Leave Act. *See* 29 C.F.R. 825.104(c)(2).

The integrated enterprise test, with its focus only on labor relations and its emphasis on economic realities as opposed to corporate formalities, *see* Phillip I. Blumberg. *The Law of Corporate Groups: Problems of Parent and Subsidiary Corporations Under Statutory Law of General*

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[6]In a "double=breasted" operation, a company divides its business into union and nonunion shops. *See Limbach Co. v. Sheet Metal Workers Int'l Ass'n,* 949 F.2d 1241, 1245 (3d Cir. 1991).

Application §13.03, at 398 (1989), is demonstrably easier on plaintiffs than traditional veil piercing. Ultimately, "the policy underlying the single employer doctrine is the fairness of imposing liability for labor infractions where two nominally independent entities do not act under an arm's length relationship." *Murray v. Miner,* 74 F.3d 402, 405 (2d Cir. 1996).

3. Direct Liability

Although not often employed to hold parent corporations liable for the acts of subsidiaries in the absence of other hallmarks of overall integration of the two operations, it has long been acknowledged that parents may be "directly" liable for their subsidiaries' actions when the "alleged wrong can seemingly be traced to the parent through the conduit of its own personnel and management," and the parent has interfered with the subsidiary's operations in a way that surpasses the control exercised by a parent as an incident of ownership. *United States v. Bestfoods*, 524 U.S. 51, 64 (1998) (quoting William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations,* 39 Yale L.J. 193, 207 (1929)). In such situations, the parent has not acted on its own (in which case there would be no need even to consider the subsidiary's actions), nor has it acted in its capacity as owner of the subsidiary; rather, it has forced the subsidiary to take the complained-of action, in disregard of the subsidiary's distinct legal personality. *See Esmark, Inc. v. NLRB,* 887 F.2d 739, 756-57 (7th Cir. 1989). Thus, in the labor context, "direct" liability may attach if the parent has overridden the subsidiary's ordinary decision-making process and ordered it to institute an unfair labor practice, or to create discriminatory hiring policies. *See id.* at 757. In

this way, direct liability functions essentially as a kind of "transaction-specific" alter ego theory. *Id.* at 756.

Although direct liability is rarely used independently to hold parents liable for their subsidiary's actions, it has often been used in conjunction with the "integrated enterprise" test for liability, particularly to satisfy the "control of labor" prong. For instance, the Ninth Circuit in *UA Local 343 of the United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465 (9th Cir. 1995), held that the "control of labor" prong of the integrated enterprise test may be established either by a showing of day-to-day control of labor, or by a showing that the parent was specifically responsible for the labor practice at issue in the litigation. *See id.* At 1471. Other courts have explained that all four factors of the integrated enterprise test are to be employed solely with an eye to discerning which entity - the parent or the subsidiary - was the final decisionmaker for the challenged practice. *See, e.g., Hukill v. Auto Care, Inc.*., 192 F.3d 437, 444 (4th Cir. 1999); *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 777 (5th Cir. 1997). Thus, the "directness" of a parent's involvement in the employment decision under dispute may be conceived as a sliding scale; if the parent has sufficiently overwhelmed its subsidiary in taking the challenged action, such a showing is sufficient to create liability; if the parent was involved to a lesser degree, there must be some demonstration of the presence of the other aspects of the integrated enterprise test.

4. Choosing a Test for WARN Liability

Given these variations in the methods by which courts

determine when corporations shall be liable for the acts of their affiliates, it is not surprising that there has been a good deal of inconsistency among the courts attempting to apply "existing law" in the context of the WARN Act.[7] In the first reported case on the subject, *Local 397, International Union of Electronic, Electrical Salaried Machine & Furniture*

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[7]In addition to the tests for liability listed above, there are numerous others that are employed less frequently, or only in specific contexts. Sometimes courts will impose liability on a parent for a subsidiary's acts based on a theory of "agency," i.e., that the subsidiary organization, although (unlike an alter ego) possessed of a distinct legal personality from the parent, has acted as the parent's agent in a series of transactions and therefore has the power to bind the parent. *See, e.g., A.T. Massey Coal Co., Inc. v. International Union, United Mine Workers of Am.*, 799 F.2d 142, 147 (4th Cir. 1986); *Publicker Indus., Inc. v. Roman Ceramics Corp.*, 603 F.2d 1065, 1070 (3d Cir. 1979); *A. Gay Jenson Farms Co. v. Cargill, Inc.*, 309 N.W.2d 285 (Minn. 1981).

Moreover, specific statutes have their own tests. For instance, the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §1381 et seq. treats as a single employer all businesses "under common control," borrowing its definition of "common control" from the Internal Revenue Code. That definition, in turn, looks purely to stock ownership to define a "controlled group," and ownership in this context includes stock options. *See IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118, 123 (3d Cir. 1986). Cases construing the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §77a et seq., have fashioned distinct standards of liability for entities that "control" businesses found to be in violation of the securities laws. *See* Lawrence, *Lender Control Liability, supra*, at 1393.

Workers v. Midwest Fasteners, Inc., 779 F. Supp. 788 (D.N.J. 1992), the court employed three different tests – Third Circuit federal veil-piercing, the integrated enterprise test, and the DOL factors – to determine whether parent and grandparent corporations could be held liable for the debts of a subsidiary. The court concluded that the corporations were separate under an "alter ego" analysis, but identical under integrated enterprise analysis and the DOL factors. In reconciling these different outcomes, the court ultimately explained that the WARN Act was enacted to protect workers, and that the "wrongdoer" should not escape liability merely because "corporate formalities" were observed – a principle that the court noted had been established in federal labor statutes generally. *Id.* at 800. Thus, the court held that the outcomes of the integrated enterprise and DOL factors would control the analysis, rendering its entire discussion of alter ego not only superfluous, but also inapposite.

Other courts have followed the multi-part *Midwest Fasteners* approach, although the application of its principles varies widely. For instance, in *Watts v. Marco Holdings, L.P.*, No. 3:95CV88-B-A, 1997 WL 578783 (N.D. Miss. Aug. 8, 1997), the court chose to apply state, rather than federal, veil-piercing analysis, all the while acknowledging that, as *Midwest Fasteners* had stated, for the purpose of determining whether two nominally separate companies constituted a single employer, state law veil-piercing was probably inappropriate. *See id.* at *2; *see also United Paperworkers Int'l Union v. Alden Corrugated Container Corp.*, 901 F. Supp. 426, 436-39 [D. Mass. 1995] (applying state corporate law, integrated enterprise, and the DOL factors and concluding that because WARN is a federal labor statute, the outcomes of the federal tests, rather than the state

alter ego test, should control).

On the opposite end of the spectrum, the court in *Wholesale Retail Food Distribution Local 63 v. Santa Fe Terminal Services*, 826 F. Supp. 326 (C.D. Cal. 1993), also applying state alter ego principles, rejected the plaintiffs' assertions that state veil-piercing was less important under WARN than the DOL factors, and chose not to employ the integrated enterprise test at all. *See id.* at 334-35. In *United Mine Workers of America, District 2 v. Florence Mining Co.*, 855 F. Supp. 1466 (W.D. Pa. 1994), the court, although purporting to follow *Midwest Fasteners*, actually appeared to apply only the DOL factors in concluding that two corporations did not constitute a single employer for WARN Act purposes. *See id.* at 1480. Finally, in *International Brotherhood of Teamsters Local 952 v. American Delivery Service,* 50 F.3d 770 (9th Cir. 1995), the Ninth Circuit expressed doubts about the need to apply several different tests for liability, yet still chose to apply both the integrated enterprise test and the DOL factors, albeit concurrently due to the tests' similarity. *See id.* at 776.[8]

The current trend toward applying more than one test

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[8]Just recently, in *Hollowell v. Orleans Regional Hospital LLC,* 217 F.3d 379 (5th Cir. 2000), the Fifth Circuit upheld a jury finding that several corporations constituted a single employer for WARN Act purposes where the jury had been instructed to follow only the DOL factors. However, it is unclear whether the court ultimately held that the DOL factors, and only those factors, were the appropriate method of analysis, for it refused to consider the defendants' arguments that the wrong legal standard had been applied. *See id.* at 389.

for affiliated corporate liability is manifestly unworkable. Not only does this approach generate considerable uncertainty for parties affected by the WARN Act (the briefs presented to us are exemplars; they spend an inordinate amount of time simply running through different possible tests for liability), but it also obfuscates the purposes of the inquiry itself, i.e., whether the affiliated corporation *should* be legally responsible for issuing WARN notice. Further, although the importation of state law standards into federal law is permissible when state law is deemed to effectuate federal policy, *see Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 457 (1957), state veil-piercing standards hardly seem likely to do so when such standards may generate inconsistency in an area of law that has always been characterized by insistence on uniformity. *Cf. Antol v. Esposto,* 100 F.3d 1111, 1115 (3d Cir. 1996) (discussing the need for uniformity in the interpretation of collective bargaining agreements). The use of state law standards also has the potential to permit "[t]he policy underlying a federal statute" to be "defeated by . . . an assertion of state power." *Anderson v. Abbott*, 321 U.S. 349, 365 (1944). Finally, the multi-test approach is both "unduly complicated," *American Delivery Serv.*, 50 F.3d at 776, and ultimately yields no definitive answer to the question of liability: When liability is uncertain enough to result in different outcomes for each of the different tests, there is no method of reconciling the results, much in the same way that a man with one watch always knows what time it is, but a man with two watches is never sure. *Cf. Papa v. Katy Indus., Inc.*, 166 F.3d 937, 940 (7th Cir. 1999) (criticizing the integrated enterprise test on the ground that there is no way to reconcile the results of the prongs).

Given these variations in the methods by which courts determine when corporations shall be liable for the acts of their affiliates, we decline to interpret the Department of Labor's statement that it does not intend to create "new" law for WARN Act liability as a direction to courts to employ multiple tests within a single case. Rather, we conclude in the Department of Labor regulations themselves. This approach not only has the virtue of simplicity (if anything allows for the creation of a uniform standard of liability for the enforcement of a federal statute. *Cf. United States v. Pisani,* 646 F.2d 83, 87-88 (3d Cir. 1981) (holding that federal veil-piercing standards are appropriate in Medicare disputes due to the need for a uniform federal approach). Finally, the most importantly, the DOL factors are the best method for determining WARN Act liability because they were created with WARN Act policies in mind and, unlike traditional veil-piercing and some of the other theories, focus particularly on circumstances relevant to labor relations.

The DOL factors are quite similar to the integrated enterprise test, which is understandable because the integrated enterprise test was also specifically intended to deal with labor relations. However, in addition to those factors that are analogous to the integrated enterprise factors, the Department of Labor's version has included a fifth, catch-all factor – that of "de factor exercise of control" close case. This factor is arguably problematic, because read in isolation, it might well encourage the imposition of liability merely as a result of the control ordinarily exercised by a parent corporation over a subsidiary by virtue of its ownership. Such a result would cause a type of liability that is not only at odds with the purpose of limited liability in general, but also would be inconsistent with the "existing legal rules" regarding parental

liability that the Department of Labor would have courts apply. *See Bestfoods*, 524 U.S. at 61-62 (describing as "hornbook" law that a parent's exercise of control through ownership of stock is not grounds for holding the parent liable for the subsidiary's actions).

In reconciling this apparent tension, we observe that the DOL factors are, by their wording, more focused than their integrated enterprise test counterparts. For instance, rather than looking to "centralized control of labor relations" – the factor that, in the integrated enterprise context, could be satisfied either upon a showing that the parent and subsidiary functioned as a single entity, or, alternatively, upon a showing that the parent directed the subsidiary to institute the policy at issue – the DOL formulation is "unity of personnel policies," a rendering that appears to be more targeted toward discerning whether the nominally separate corporations actually functioned as a single entity with respect to such policies on a regular, day-to-day basis. Similarly, the "common management" prong of the integrated enterprise test, which allowed courts to focus not only on employees holding formal officer positions or directorships but also on employees occupying supervisory positions, *see, e.g., Hukill v. Auto Care, Inc.*, 192 F.3d 437, 443 (4th Cir. 1999); *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 25-26 (1st Cir. 1983), has been changed to "common officers and/or directors," a facially more specific requirement.

In light of these changes, and in light of the instruction that the test should draw upon existing legal rules, we read the "de facto exercise of control" factor as an endorsement of the sort of hybrid direct liability analysis heretofore employed in the context of the integrated enterprise test – allowing

consideration not only of whether the two corporations shared the same labor policies, as the DOL's "unity" factor would suggest, but also of whether the parent company directly exercised control over the particular policy at issue. We further conclude that the regulation's specific instruction that the "factors" are a nonexhaustive list is meant only as a reminder that the inquiry is a balancing test, and that, as with most balancing tests, a number of circumstances may be relevant. Just as the integrated enterprise test is often described as ultimately an inquiry into whether the two companies operated at arm's length, *see NLRB v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117, 1122 (3d Cir. 1982), we believe that the Department of Labor's instructions are intended to allow the consideration of evidence that might otherwise fall outside of the listed factors in order to conduct such an inquiry.

5. Conclusion

In the long history of the corporate form and limited liability, both the common law and various pieces of legislation have developed numerous methods for determining when affiliated corporations should be treated as unified or as distinct entities. These methods are often quite different from each other, and vary across contexts. In light of this history, if we were to interpret the DOL's WARN Act liability for affiliated corporations as a literal direction to employ the various tests that have been developed over the years, we would find ourselves ensnared in a web of complicated – and conflicting – lines of jurisprudence. We cannot believe that the Department intended such a result.

Rather, in our view, the Department intended for

courts to test for affiliated corporate liability under WARN along the dimensions specifically enumerated in its regulation. These dimensions, in turn, were adapted from other tests developed for intercorporate liability, most notably labor law's "integrated enterprise" test. In light of the similar considerations inherent in the DOL factors and in other such "veil-piercing" tests, we believe that the DOL's instruction that courts apply "existing law" is intended only to encourage courts to make use of established precedent in interpreting and applying its factors. Further, via its statement that the factors are meant as a nonexhaustive list, the DOL has made room for the exercise of the flexibility that this area of law requires. Accordingly, in determining whether two or more corporations constitute a single "employer," the factfinder may consider not only the aspects of corporate organization specifically listed in the regulation, but also may consider the other indicia of corporate "sameness" that have characterized this area of the law, such as nonfunctioning of officers and directors, gross undercapitalization, and other circumstances that demonstrate a lack of an arm's-length relationship between the companies.

We also interpret the DOL's inclusion of the "de facto exercise of control" factor to be an endorsement of the hybrid direct liability analysis heretofore employed in the context of the integrated enterprise test. Thus, the "de factor exercise of control" prong allows the factfinder to consider whether the parent has specifically directed the allegedly illegal employment practice that forms the basis for the litigation.

C. Lender Liability Under the WARN Act

1. Discussion

The preceding discussion focused on the standards to e employed for parent/subsidiary liability (or between sister corporations). But at the time their venture began, GECC was a major secured lender of Comptech, and not a parent. Neither the WARN Act itself, nor the regulations, explicitly discuss the statute's applicability to lenders, but we agree with both the Eighth and the Ninth Circuits that, under some circumstances, a lender can become so entangled with its borrower's affairs so as to engender WARN Act liability. *See Adams v. Erwin Weller Co.*, 87 F.3d 269, 271 (8th Cir. 1996); *Chauffeurs, Sales Drivers, Warehousemen & Helpers Union Local 572 v. Weslock Corp.*, 66 F.3d 241, 244 (9th Cir. 1995). Thus, the question becomes what circumstances must exist before such liability can attach.

Courts have grappled with the question of lender liability in a wide variety of situations, such that the catch-phrase "lender liability" has now taken on a broad meaning to refer to any kind of liability that can grow out of the lender/borrower relationship. *See e.g.,* Lawrence, *Lender Control Liability*, supra (describing various theories under which lenders can be held liable either to their borrowers or to third parties). For our purposes, the most relevant lines of precedent are those where third parties seek to impose liability on major lenders on the theory that the lenders have so controlled the borrowing corporation that the corporation was functionally being run by the lenders, or creditors. *See, e.g., Krivo Indus. Supply Co. v. National Distillers & Chem. Corp.*, 483 F.2d 1098 (5th Cir. 1973). Often, these claims arise in the context of a bankruptcy proceeding, whereby the creditors or the trustee seek equitable subordination of the major lender's claims. *See, e.g., In re W.T. Grant Co.*, 699 F.2d 599 (2d Cir. 1983). In other situations, creditors simply

sue the major lender on the theory that the lender's control over the borrower rendered the lender the real party in interest for the incurred debt. *See, e.g., Combustion Sys. Servs., Inc. v. Schuylkill Energy Res., Inc.*, Civ.A. 92-4228, 1993 WL 514496 (E.D. Pa. Dec. 1, 1993).

In these situations, the test usually applied is some version of traditional veil-piercing, be it alter ego, instrumentality, or some other formulation. *See, e.g., In re Clark Pipe & Supply Co., Inc.*, 893 F.2d 693, 699 (5th Cir. 1990) (explaining that, in the absence of fraud, a lender must have used its debtor as an instrumentality to justify equitable subordination); *Great West Cas. Co. v. Travelers Indem. Co.*, 925 F. Supp. 1455, 1462-63 (D.S.D. 1996) (utilizing state veil-piercing standards to determine whether a lender would be liable to a third party for the debtor's debts). This is precisely the test that was employed by the District Court when it concluded that because GECC was a lender and not a parent, the integrated enterprise test was inapplicable. *See Pearson v. Component Tech. Corp.*, 80 F. Supp. 2d 510, 520 (W.D. Pa. 1999). We believe, however, that traditional lender/borrower veil-piercing jurisprudence is inappropriate in the WARN Act context for many of the same reasons that we rejected such jurisprudence in the context of parent/subsidiary liability.

To begin with, the precedent on this point does not draw as sharp a distinction between "lenders" and parents" as the District Court perceived. Although *Krivo* and its progeny employed strict veil piercing standards to suits against lenders, they did so in situations where even parents would have been examined under such standards. The only differences between parents and lenders came in the test's

application, both via the court's awareness of the changed context, *see Krivo,* 483 F.2d at 1110 (observing that the lender's "control" was limited to its financial interest as a major creditor), and the court's statement that the lack of stock ownership is "a factor to be considered in assessing the relationship between two companies," *see id.* At 1109; *see also Riquelme Valdes v. Leisure Res. Group, Inc.,* 810 F.2d 1345, 1353 (5th Cir. 1987) (explaining that complete ownership is a "symptom but not the *sine qua non* of alter ego status"). It follows that when the appropriate test for parental liability is something other than the strict alter ego test, there should be a parallel change in the test for liability for lenders.

Further, traditional veil-piercing jurisprudence tends to sweep quite broadly, allowing liability to attach only when there is complete unity of identify in all aspects of corporation functioning. *See, e.g., Krivo*, 483 F.2d at 1105 (liability attaches to lenders only when there has been "total control" over the debtor). Although such an inquiry may be appropriate for many types of claims, the mere existence of the integrated enterprise test demonstrates that in the labor context, a more targeted inquiry is appropriate. We acknowledge that the DOL factors are explicitly made applicable in the WARN Act regulation only to "subsidiaries" and not to borrowers, but do not read that reference as precluding the application of the factors to lenders; rather, we believe that by directing courts to examine these particular factors, the Department of Labor was highlighting those aspects of corporate functioning that are most closely tied to the particular problems the WARN Act was intended to

address.[9]

Additionally, the problem with creating such a sharp distinction in liability rules under the WARN Act for lenders and for parents is that it will not always be clear when a party should be characterized as a "lender," when a party should be characterized as a parent or owner, and when a party occupies both roles. In the case before us, GECC began its relationship with Comptech as a lender, but subsequently foreclosed on the stock and, rather than merely holding the stock for only a few days before the plant closure (as was the case in *Weslock*), transferred it (for no consideration) to Comptech's Chief Executive Officer (then under contract to GECC), yet retained a considerable amount of control over the stock for the next several years as part of its plan to

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[9]In its own decision granting summary judgment to GECC, the District Court relied on cases involving standards for equitable subordination in the bankruptcy law context, such as *In re W.T. Grant,* 699 F.2d 599 (2d Cir. 1983), and standards regarding allegations that lenders have breached fiduciary obligations to borrowers, such as in *Temp-Way Corp. v. Continental Bank,* 139 B.R. 299 (E.D. Pa. 992), *See Pearson,* 80 F. Supp. 2d at 51. We do not believe that these precedents are particularly instructive. Both sorts of claims set a high bar for plaintiffs because the causes of action rely upon an allegation of wrongdoing by the lender. WARN Act liability, by contrast, requires no showing of fraud or even a culpable mental state, although a court may, in its discretion, reduce penalties if the employer proves good faith. *See* 29 U.S.C. §2104(a)(1)(B)(4). Therefore, the standards justifying equitable subordination cannot be freely transferred. *Cf.* Lawrence, *Lender Control Liability, supra.* at 1388 (criticizing court's tendencies to apply similar definitions of "control" for lender liability, no matter what the cause of action).

"hold" Comptech until the company could be restored to profitability. Given the ease with which Thomas Gaffney parted with the stock upon being eased by GECC to relinquish his position with Comptech, it is certainly not clear that GECC should not be viewed as having owned Comptech's stock from the date of foreclosure until the date that the company was finally liquidated.

Lenders may also occasionally be difficult to distinguish from parents because, although generally the difference between a "parent" and a "lender" is the existence of an equity, rather than a debt, interest in the company, lenders often structure their interests in hybrid ways. In this case, in addition to traditional loans, GECC chose to structure part of the debt by having Comptech modify its articles of incorporation so as to create a class of mandatorily redeemable preferred stock tailored to GECC's interest. Such redeemable preferred stock is currently listed as neither equity nor liability according to U.S. generally accepted accounting principles. *See International Accounting Standards*, SEC Release Nos. 33-7801 & 34-42430, 65 Fd. Reg. 8,896, 8, 911 (Feb. 23, 2000). However, it is sometimes classified as equity in SEC opinions, *see, e.g., The Southern Company,* SEC Release Nos. 35-27323 & 70-8277, 2000 SEC LEXIS 2860 (Dec. 27, 2000), although international accounting standards list such stock as a liability, *see International Accounting Standards, supra,* and federal regulations forbid such stock from being listed as stockholders' equity, *see* 17 C.F.R. §210.5-02. *See generally* Anthony P. Polito, *Useful Fictions: Debt and Equity Classification in Corporate Tax Law,* 30 Ariz. St. L.J. 761 (1998) (explaining the fluidity of the concepts of "debt" and "equity").

Several federal statutes have defined the term "parent" in such a way as to include GECC's interest. For instance, the Internal Revenue Code at 26 U.S.C. §1563 defines as "parents" in a controlled group those companies that own eighty percent of the of the stock of other corporations in the group, and 26 U.S.C. §1202 requires only fifty percent ownership. Ownership, in turn, is defined throughout the Code to include stock options. *See, e.g.*, 26 U.S.C. §§318, 544, 554, 1563. Under these definitions, GECC was a parent of Comptech after the transfer to Charles Villa, because GECC retained options on all of Comptech's stock. The Code of Federal Regulations also contains definitions of "parent" and "subsidiary" that would include GECC's relationship to Comptech as a result of its power to vote the stock in the wake of Comptech's default. *See* 17 C.F.R. §210.1-02. And Pennsylvania law defines the term "subsidiaries" for registered corporations as including those corporations for which another corporation has obtained options on fifty percent of the voting stock, *see* 15 Pa. Cons. Stat. §2542, a definition that would also apply to GECC due to its calls obtained during the stock transfer to Villa. That the supreme Court of Delaware described the right to vote a majority of the board in the event of default as a "creditor's remedy" in *In re Bicoastal Corp.*, 600 A.2d 343, 350 (Del. 1991), merely serves to highlight the hybrid nature of such rights. Obviously, however, the regulatory purposes of these statutes (and the WARN Act itself) vary considerably.

Finally, we note that the commonly understood difference between a "parent" and a "lender" – i.e., the existence of an equity interest – is largely accounted for in the DOL factors themselves, via the "common ownership" prong. Although this factor is typically referred to as the "least

important" of the factors, *International Bhd. of Teamsters Local 952 v. American Delivery Serv.*, 50 F.3d 770, 775 (9th Cir. 1995), these statements mean only that, by itself, ownership – and even ownership coupled with common management – is not a sufficient basis for liability, *see Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 778 (5th Cir. 1997). Although "financial control" will suffice to satisfy the "common ownership" prong of the integrated enterprise test, *see, e.g., Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1362 (10th Cir. 1993), and it is likely that the DOL factors should be interpreted similarly, there is nothing to prevent courts from requiring a higher showing of control in the absence of true ownership, just as they have done in traditional veil-piercing lender cases. *See, e.g., Riquelme Valdes,* 810 F.2d at 1354.

2. Conclusion

All things considered, including the absence of a satisfactory alternative, we are satisfied that the DOL factors are an appropriate method of determining lender liability as well as parental liability, and therefore hod that, regardless of whether GECC took on the status of "parent" in addition to its status of "lender" when it foreclosed on the stock, its involvement with Comptech will be tested by reference to those factors. We emphasize, however, that just as *Krivo* and similar cases took special note of the unique relationship between a lender and a borrower, so should courts do the same when utilizing the DOL factors. Thus, courts should place special weight on a lender's lack of stock ownership, and the mere fact that a lender has loaned money to the borrower – thus making the borrower, in some sense, financially beholden to the lender – will not establish liability, or even "dependency of operations" as that phrase is used in

the DOL test, just as a parent's ownership of stock will not suffice to create liability for the parent.

Our application of the DOL factors will not, however, be dominated by an assessment of whether the defendant's behavior was "typical" of a secured lender, as other courts (including the District Court in this case) have done. *See Pearson*, 8 F. Supp. 2d at 525; *see also Adams*, 87 F.3d at 272 (refusing to hold a lender liable for WARN Act violations because the lender's control was not "unusual for a lender loaning over eighteen million dollars"); *Weslock*, 66 F.3d at 245 (refusing to hold lender liable because the control exercised was "consistent with the type of control a secured creditor legitimately may exercise over a defaulting debtor" (quotations omitted)). "Typical" lender behavior is a mutable concept, and it will respond to the liability rules we put into place. *See* Robert E. Scott, *A Relationship Theory of Secured Financing*, 86 Colum. L. Rev. 901, 934 (9=1986) (explaining that, if not for the liability rules currently in place, creditors would exercise more control over debtors than is now customary). Further, even total control of a delinquent borrower's business might well be justified as an effort to protect collateral. *See id.* Thus, although courts should attend to the customary relationship between lender and borrower (just as they have attended to customary relationships between parents and subsidiaries in relationships between parents and subsidiaries in determining liability), they should also make a functional assessment of the amount of control involved.

D. Summary

Affiliated corporate liability under the WARN Act is

ultimately an inquiry into whether the two nominally separate entities operated at arm's length. *Cf. NLRB v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117, 1122 (3d Cir. 1982). To that end, the Department of Labor has specifically mandated consideration of: (1) common ownership, (2) common directors and/or officers, (3) de facto exercise of control, (4) unity of personnel policies emanating from a common source, and (5) the dependency of operations. We acknowledge that although these factors do not correspond precisely to established tests for liability, reliance on analogous precedent may often be useful in the interpretation and application of those factors.

We believe that the DOL's caveat that the factors are a nonexhaustive list is intended to allow the factfinder to consider other evidence, if any, of a functional integration between the two nominally separate entities – with, as always, an eye to the sorts of circumstances that courts have considered relevant to "veil-piercing" inquiries in the past. So, although ordinarily such hallmarks of integration as "nonfunctioning of officers and directors" and "nonpayment of dividends" are not of great importance in the labor context, certainly the facfinder would be permitted to take such arrangements into account when determining WARN Act liability, as well as any other arrangements that bear on the question whether the two companies failed to maintain an arm's-length relationship.

Further, the "de facto exercise of control" factor allows the factfinder to consider, as has been done in the "integrated enterprise" context, whether a parent corporation was the final decisionmaker for the challenged practice. If the evidence of the parent's control with respect to the practice is

particularly egregious – for instance, if the parent corporation has "disregard[ed] the separate legal personality of its subsidiary" in directing the subsidiary to act, *Esmark, Inc. v. NLRB,* 887 F.2d 739, 757 (7th Cir. 1989) – such evidence alone might be strong enough to warrant liability.

Finally, we conclude that these factors, with their labor-specific focus, are more appropriate than traditional veil-piercing jurisprudence for gauging WARN Act liability with respect to lenders. As has always been the case, when a plaintiff seeks to hold one corporation liable for the debts of another, particular attention must be paid to any lack of an ownership interest between the two corporations, and such a lack must be weighed heavily against a finding of liability for the affiliated corporation. Further, just as a parent will not be held liable solely because of its ownership of the subsidiary, so too a lender will not be liable solely because of the financial dependence that necessitated that loan in the first place.

However, notwithstanding the importance of a lack of ownership interest between two corporations, we believe that in the application of the DOL factors, the ultimate inquiry should not depend entirely on an assessment of whether the lender has behaved in a "typical" fashion. "Typical" lender behavior is a mutable concept, and it will respond to the liability rules we put into place. Thus, although the customary relationship between lender and borrower is a relevant consideration (just as customary relationships between parents and subsidiaries have always been relevant to the determination of liability), there must also be a functional assessment of the amount of control exercised by the lender.

III. Applying the Test

Now that we have set forth the standard for liability, we must determine whether plaintiffs have put forth enough evidence that GECC and Comptech constituted a single employer under the WARN Act to survive GECC's motion for summary judgment. Therefore, we will analyze the plaintiffs' evidence by reference to the DOL factors. We note at the outset that our adoption of the DOL factors as the proper test for WARN Act liability compels a rejection of the plaintiffs' first contention, i.e., that solely by virtue of its ownership of Comptech stock options, GECC was a WARN Act employer.

In deciding that the DOL factors are appropriate for WARN Act veil-piercing, we also hold that the application of those factors is a "factual" question rather than a "legal" one. Although our own jurisprudence has been somewhat opaque as to whether the veil-piercing/alter ego tests present factual questions or legal ones, *compare Craig v. Lake Asbestos of Quebec, Ltd.*, 843, F.2d 145, 148-49 (3d Cir. 1988), with *Carpenters Health & Welfare Fund v. Kenneth R. Ambrose, Inc.*, 727 F.2d 279, 283 (3d Cir. 1983), it is well established that the "integrated enterprise" test – which is more akin to the DOL factors – presents a factual questions, *see, e.g., Limbach Co. v. Sheet Metal Workers Int'l Ass'n*, 949 F.2d 1241 (3d Cir. 1991). In light of our treatment of the integrated enterprise test, as well as the fact that most jurisdictions treat veil-piercing inquiries as factual, *see Crane v. Green & Freedman Baking Co.*, 134 F.3d 17, 22 (1st Cir. 1998), we conclude that the WARN Act test for intercorporate liability presents a question of fact. Of course, as is always the case, our decision to characterize it as such does not

preclude an inquiry as to whether plaintiffs have put forth enough evidence to create a genuine issue of material fact so as to survive summary judgment.

A. Common Ownership

After GECC purchased Comptech at a private foreclosure sale, it immediately transferred the shares to Gaffney and Brooks. When Gaffney stepped down as Comptech's Chief Executive Officer, Gaffney and Brooks transferred their shares back to Holdings, and the shares were reissued to Villa. Technically, then, GECC was not the owner of Comptech at the time of the unnoticed plant closure, but most favorable to the plaintiffs, allows for the possibility that these transactions were not bona fide transfers of ownership. *See, e.g., NLRB v. Big Bear Supermarkets #3,* 640 F.2d 924, 930 (9th Cir. 1980) (upholding a finding of single employer status in part due to the fact that the transfer of ownership to an insider for no consideration did not bear the hallmarks of a bona fide transaction).

Gaffney was under contract to GECC at the time he received the shares; he paid no consideration for them, pledged them to GECC as security for Comptech's loans, and, in fact, was indemnified by GECC for any liability arising out of his status as shareholder. He relinquished the shares for only nominal consideration at GECC's request. When Villa received the shares, he paid only nominal consideration, pledged the shares and stock powers to GECC, and took them subject to GECC's extensive options. Finally, GECC's own restructuring memo (authored by GECC Vice-President Jeanette Chen) recommended both that Comptech be "held"

until the "investment" could be recouped, and that "ownership" be transferred to the management team, suggesting that GECC understood itself to be the true owner of the shares despite the normal vesting of title in Gaffney, Brooks, and Villa.

We agree with the Ninth Circuit that a prerequisite for lender liability is that whatever responsibility the lender may have assumed for the borrower's business, such responsibility must have been for the "ordinary operation" of the business. Thus, as in bankruptcy law, the lender may not be liable under WARN for "winding up" or foreclosure activities not taken as part of an effort to operate the business in the "normal commercial sense." *Weslock*, 66 F.3d at 245, even if, as a result of the foreclosure, the lender "owns" the shares for some period of time. *Cf. In re United Healthcare System, Inc.*, 200 F.3d 170, 179 (3d Cir. 1999) (holding that a fiduciary's "winding up" activities in the course of a company's liquidation pursuant to a bankruptcy filing cannot give rise to WARN Act liability). However, GECC's own documents demonstrate that it was not involved with Comptech merely long enough to wind up the affairs of the company; rather, in its own words, it intended to "hold" Comptech until its investment could be recouped and for Comptech to continue to conduct ordinary operations. For these reasons, we believe that, for summary judgment purposes, drawing all inferences in the plaintiffs' favor, the common ownership prong is satisfied. GECC cannot escape the inference that it "owned" Comptech simply by focusing attention on the formal "ownership" of Gaffney, Villa, and Brooks, or by characterizing its activities as those of a lender engaged in liquidation.

B. Common Directors and/or Officers

This factor, which may be analogized to the integrated enterprise test's "common management" factor, ordinarily looks to whether the two nominally separate corporations: (1) actually have the same people occupying officer or director positions with both companies; (2) repeatedly transfer management-level personnel between the companies; or (3) have officers and directors of one company occupying some sort of formal management position with respect to the second company. *See, e.g., Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1364 (10th Cir. 1993) (finding no common management where the affiliated corporations shared no officers and only a single officer of the parent served in a managerial capacity with respect to subsidiaries); *Local No. 627, Int'l Union of Operating Eng'rs v. NLRB*, 518 F. 2d 1040, 1047 (D.C. Cir. 1975) (finding the common management prong satisfied by several interchanges of higher-level managers and officers between the corporations), *overruled on other grounds by Southern Prairie Constr. Co. v. Local 627, Int'l Union of Operating Eng'rs*, 425 U.S. 800 (1976) (per curiam). In this case, there is no allegation that Comptech's top officers and directors –Gaffney, Brooks, and Villa- ever occupied any sort of director or officer position with GECC. Rather, the plaintiffs' theory is that these three men functioned as "agents" of GECC, and, because of that relationship, GECC's officers and directors were also officers and directors of Comptech.

Although we will discuss the application of agency principles to WARN Act liability in more detail below, for now we observe that the plaintiffs' interpretation of this particular prong is misdirected. The WARN Act test - like

the related integrated enterprise test- is intended to discover whether the two nominally separate entities actually functioned as a single business, particularly with regard to labor policy. *See NLRB v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117, 1111 (3d Cir. 1982); Armbruster *v. Quinn*, 711 F.2d 1332, 1338 (6th Cir. 1983) (a finding of single-empioyer status is justified when the corporations are "highly integrated with respect to ownership and operations" (citations omitted)). To that end, the "common officers and/or directors" prong of the test should look only to whether some of the same individuals comprise (or, at some point, did compromise) the formal management team of each company. *See, e.g., Armbruster*, 711 F. 2d at 1339 (in the integrated enterprise context, describing as "sketchy" evidence of common management even where a single person had served as president of both companies, and where the subsidiary had formally released decision making power to the parent).

The plaintiffs' theory, by contrast, is more appropriately employed to satisfy other prongs of the test, such as the "de facto of control", factor the factor relating to personal policy, or the factor relating to dependency of operations. *See e.g., Frank*, 3. F.3d at 1362-63 (evaluating an allegation that the officers of the subsidiary were controlled by the officers of the parent in the context of the interrelation of operations prong of the integrated enterprise test). This is particularly true in light of the fact that the DOL factors, rather than using the phrase "common management" as is utilized by the integrated enterprise test, instead specifically require the presence of common directors or officers, a formulation that is facially more narrow. Plaintiffs have not demonstrated the existence of any persons who, either

simultaneously or in consecutive periods, held a directorate or an officer position both with Comptech and with GECC, and the "agency" theory with respect to Gaffney and Villa– which we discuss in more detail below– would not satisfy this requirement even if we were to accept its truth. Thus, we conclude that the plaintiffs have not created an issue of fact with respect to the presence of common directors or officers, and this factor must be weighed in favor of the defendant.

C. Unity of Personnel Policies Emanating from a Common Source

We begin by interpreting the language of this prong to require the factfinder to focus the inquiry less on the hierarchical relationship between the companies (as such relationships may be considered in other aspects of the test) than on whether the companies actually functioned as a single entity with regard to its relationships with employees.

That GECC and Comptech did not share labor policies, or even coordinate their labor policies, is essentially undisputed.[10] Affidavits from Comptech and GECC employees demonstrate that Comptech had its own employees demonstrate that Comptech had its own personnel managers who never received any direction from GECC regarding their duties, and no evidence has been offered to contradict these statements. But even were we to accept the plaintiffs' theory

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[10]We believe that a "coordinated labor policy would be as relevant as a "unified" policy; for instance, in double-breasted operations, there is obviously no "unity" of policy–and yet this is precisely the type of situation the test is meant to capture.

that Villa, as GECC's agent, at some level instituted all of Comptech's policies, including labor policies, on GECC's behalf, such evidence is not sufficient to satisfy this prong of the test in the absence of indications that GECC had a particular interest in how Comptech's labor policies were designed, or issued specific directives to Villa on the subject. The evidence that plaintiffs have offered to demonstrate that GECC had an interest in controlling the personnel policies at Comptech is scant, and largely amounts to establishing that Comptech, pursuant to the terms of the loan agreement (and on a very few occasions) sought GECC approval for decisions to institute bonus programs and to pay salaries in excess of $100,000. Such limited monitoring of compensation expenditures as part of a general loan agreement requiring oversight of Comptech's spending in a number of areas is not sufficient to demonstrate a "unity of personnel *policies* emanating from a common source."

There are some inconsistencies in the evidence submitted by GECC. GECC submitted the affidavit of Jeanette Chen, who swore that GECC had never attempted to control the hiring or firing of Comptech employees, and that the loan restriction preventing Comptech from paying salaries in excess of $100,000 was intended to ensure that Comptech maintained a frugal budget. But both of these statements were contradicted by other pieces of evidence in this litigation. Gaffney's letter to GECC specifically states that he resigned his post as CEO of Comptech at GECC's request, and other deposition evidence indicates that he was asked to resign due to GECC's dissatisfaction with his strategies for Comptech. Moreover, internal GECC memoranda characterize the salary restriction as part of an effort to ensure that GECC could monitor the hiring of "key" personnel. Finally, the existence

of the "Villa Call" and the references to Benton as a "back up president" seem to show that GECC, if nothing else, conceived itself as having control over the hiring and firing of Comptech's president.

Despite these inconsistencies, we do not believe that plaintiffs have created a genuine issue of material fact as to the existence of a "unity" of policy. Even if we were to disregard Chen's affidavit entirely and focus solely on the other evidence, the fact that GECC may have controlled the hiring and firing of the company's president and chief executive officer, and monitored the hiring of a few other high-level managers (there is no evidence that GECC ever suggested that a particular person other than Benton be hired, or prevented a candidate from being hired), simply is not enough to find an "unity" of personnel "policy."

The plaintiffs alternatively urge us to weigh this factor in their favor on the ground that the analogous "centralized control of labor" prong from the integrated enterprise test permits an inquiry into whether the parent corporation, though perhaps not involved in day-to-day employment policies, mandated the employment practice at issue. Plaintiffs allege that GECC made the decision to close the plant, and because the plant closing is the relevant practice giving rise to the litigation, submit that that decision enough to tip the balance. However, as explained above, we believe that for WARN Act purposes, allegations of this kind of "direct" control are more appropriately considered as part of the "de facto exercise of control" factor, discussed *infra*. We conclude that the plaintiffs have not created a genuine issue of fact as to the existence of a unified personnel policy, and we will weigh this factor in the defendant's favor.

D. Dependency of Operations

We consider the "dependency of operations" factor to be virtually identical to the integrated enterprise test's "interrelation of operations" factor, and will consider it in that light. When examining the "interrelation of operations" factor, courts generally consider the existence of arrangements such as the sharing of administrative or purchasing services, *see, e.g., Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 25 (1st Cir. 1983), interchanges of employees or equipment, *see Hukill v. Auto Care, Inc.*, 192 F.3d 437, 443 (4th Cir. 1999), and commingled finances, *see UA Local 343 of the United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. of the U.S. & Can. v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465, 1472 (9th Cir. 1995). No evidence of this sort was presented by the plaintiffs. Instead, plaintiffs reiterate their theory that Villa, and Gaffney before him, were stooges, or at least agents, of GECC, and that therefore all of their actions may be attributed to GECC. Because certainly Villa and Gaffney were routinely involved with the day-to-day operation of the business, the plaintiffs maintain GECC was in the position of general manager of the company.

We decide whether to apply agency principles to establish liability under a federal statute in accordance with the degree to which such principles effectuate the policies of the statute. *See AT&T v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1429-33 (3d Cir. 1994). This is not dissimilar from the rules of common law, where there are different types of agency relationships, and the degree to which the actions of the agent are attributed to the principal vary for each. *See id.* at1434-35. Thus, if we are to import

any agency principles to the test for WARN Act intercorporate liability, we must do so selectively, with an eye to effectuating WARN Act purposes.

Plaintiffs argue that the "agency" relationships alleged to exist between GECC and Gaffney, and later between GECC and Villa, establish that GECC had control over the day-to-day operations of Comptech. Control over day-to day operations has been held to be indicative of interrelation of operations. *See, e.g., Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 778 (5th Cir. 1997); *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1241 (2d Cir. 1995). However, the mere fact that the subsidiary's chain-of-command ultimately results in the top officers of the subsidiary reporting to the parent corporation does not establish the kind of day-to day control necessary to establish an interrelation of operations. See Frank v. U.S. West Inc., 3 F.3d 1357, 1362-63 (10th Cir. 1993); *Martin v. Safeguard Scientifics, Inc.*, 17 F. Supp. 2d 357, 364 (E.D. Pa. 1998) ("[I]t is never sufficient to establish only that a chain of command eventually ends at the parent's headquarters.").

Moreover, dependency of the operations cannot be established by the parent corporation's exercise of its ordinary powers of ownership, i.e., to vote in directors and set general policies. *See Lusk*, 129 F.3d at 778. Therefore, if "agency principles" are to be used to weigh the "dependency of operations" factor in plaintiffs' favor, the policies behind WARN Act liability-and limited liability for corporations generally- require that the plaintiffs establish that the scope of the agency relationship was such that GECC had the right to direct and control the manner in which Gaffney and Villa undertook their duties. In other words, for such an all-

encompassing factor such as "dependency of operations" - a factor which, by its nature, looks to the daily functioning of the two companies - the plaintiffs must establish the existence of what was known at common law as a "master-servant" agency relationship. See AT&T, 42 F.3d at 1435.

Plaintiffs' evidence on this point consist of: (1) letters and similar contacts from both Gaffney and Villa to GECC requesting permission to take certain kinds of actions that the loan documents would otherwise forbid; (2) the terms of the consulting agreement between Gaffney and GECC and the circumstances surrounding his employment; (3) the circumstances surrounding the firing of Gaffney and his replacement with Villa ; and (4) the fact that consultant Stuart Benton was brought in at GECC's request, and apparently worked closely with Villa.

We do not believe that this evidence is sufficient to create an issue of fact with regard to an agency relationship that would support a finding of dependency of operations. At most, the evidence establishes that Gaffney was something of an independent contractor, hired, according to the terms of his contract, to "exercise general executive authority over all business operations of the companies subject at all times to the control of the board of directors ." In other words, Gaffney's actions are not attributable to GECC merely by virtue of the existence of his consulting agreement.

Further, because Villa was president and CEO of Comptech at the time of closing, as well as at the time that plaintiffs argue that WARN Act notice should have issued, it is his relationship with GECC that is more relevant-and Villa's relationship was even more tenuous than Gaffney's.

Villa was not under contract to GECC, and in fact, Chen attested (and the plaintiffs have not disputed) that she was unaware that Gaffney had even replaced Brooks with Villa until the chief financial officer mentioned it to her in the course of conversation . Though GECC did apparently view itself as having the power to remove Villa (hence the Villa Call), has we have stated , such general powers of ownership are not sufficient basis for a finding of liability. Further, the right to hire or fire does not, in itself, distinguish a "master-servant" agency relationship from any other sort of agency relationship. In fact, the most plaintiffs are able to muster with regard to an agency relationship with Villa and GECC is the letter Villa wrote asking GECC to "make decisions now" concerning the requests he had outlined. These requests, however, were for additional financing and (the letter is not entirely clear) perhaps permission for a large-scale merger. These are not the kind of mine-run matters that would support a finding that Villa was behaving as GECC's agent in his management of Comptech.

The situation in *Citibank, N.A. v. Data Lease Financial Corp.*, 828 F.2d 686 (11th Cir. 1987), presents a useful contrast. In that case, a corporation defaulted on its loans and the major creditor exercised its rights to elect a new slate of directors. The new directors allegedly mismanaged the company, and the borrower brought suit against the lender on the theory that the directors had acted as the "agents" of the lender. *See id.* at 691. The court concluded that the borrower had created a genuine issue of material fact as to the existence of an agency relationship , basing its decision in part on the deposition testimony of one of the directors, in which he stated that he both worked for the lender, and that he worked closely with the lender on all major matter of policy.

See id. at 692 . Such evidence stands in stark contrast to the situation before us, in which the man alleged to be GECC's agent submitted an affidavit, as well as deposition testimony, denying that GECC ever controlled his actions, and the plaintiff have produced no specific instances of GECC control to rebut his testimony.

As for Villa's and Gaffney's request for GECC approval of actions involving large-scale expenditures, restructuring, or the disposition of equipment in which GECC retained a security interest, these cannot form the basis of a demonstration of "dependency of operations," as there in no evidence the GECC ever did anything more than approve or disapprove such requests, and no evidence that it was involved in the details or manner of implementation of any Comptech business plans. GECC was exercising one of the defining rights of a secured lender: the right to prevent the transfer of its collateral . That GECC may also, at this point, have been a "parent" of Comptech does not prevent it from exercising such pedestrian creditor's rights without incurring liability , any more than parental status prevents a company from controlling its subsidiary's boards of directors without incurring liability. *Cf. Japan Petroleum Co. (Nigeria) Ltd. v. Ashland Oil, Inc.*, 456 F. Supp. 831, 846 (D. Del. 1978) (refusing to pierce the corporate veil in part because the "control" alleged by the plaintiffs was attributed to the fact that the parent corporation was a major creditor of its subsidiary) . We do not intend to create a jurisprudence that discourages loans in general or rescues of troubled business enterprises in particular. Further, the fact that in an attempt to keep itself operational, Comptech independently sought additional financing from an outside lender to replace GECC cuts against a conclusion that Comptech was closely integrated

with GECC itself.

If GECC's "loans" to Comptech had not been made at arm's length (either because of a failure to require interest payments, a lack of formal documentation . etc) such evidence would cut in favor of finding a dependency of operations. See , e.g., Vance v. NLRB 71 F.3s 486, 493 (4TH Cir. 1995) (per curiam) (finding an interrelation of operation in part because numerous interest-free, or unrepaid, "loans" between corporation). But there is nothing to suggest that GECC's loans to Comptech were anything other bona fide arm's length transactions. As for the plaintiffs' final allegation , that Benton served as something of a roaming GECC "enforcer" once again, plaintiffs have failed to submit any support of their claims. Villa, Benton, and other top-level Comptech managers all attested that Benton did nothing more than observe and occasionally make suggestions, only some of which were followed. No evidence has been offered to suggest that GECC was using Benton functionally to manage Comptech's day to day activities.

Finally, we address the question whether there can be said to have been "dependancy" of operation due to the fact that Comptech was financially dependant on GECC's loans, and ultimately was unable to stay afloat without them. As we remarked earlier, the loans were made in the ordinary course of business, and there is no evidence that they included especially favorable terms or bore other indicia of a lack of legitimacy. Under such circumstances , loans- even from a parent to a subsidiary- cannot be sufficient to satisfy this prong, particularly in this context where there is no serious dispute that GECC, rather than attempting to establish a continuing relationship whereby Comptech would be

permanently dependant on GECC for financing, was instead by this point conducting a "rescue" operation in an attempt to "return Company to profitability". We surely do not want to discourage companies from attempting to keep their subsidiary operations afloat with temporary loans by holding that the mere fact that loans were even necessary establishes a " dependancy of operations" giving rise to liability, *Cf. United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St.*, 960 F.2d 1080, 1094 (1st Cir. 1992) (refusing to find "inadequate capitalization " in alter ego inquiry where parent repeatedly infused subsidiary with cash in an ultimately unsuccessful attempt to resurrect a failing company).

The same logic stands true for GECC's enforcement of the prepayment provisions of its loans upon Comptech's sale of R&R Plastics. Regardless of whether GECC was Comptech's parent as a result of its option or its stock ownership, it also was indisputable a lender as a result of the revolving lines of credit and the repeated cash advances. As such, an attempt to see seek repayment of its loans cannot be realistically characterized as a "siphoning" of funds or as part of a deliberate attempt to keep Comptech undercapitalized.

Therefore, we conclude that the plaintiffs have failed to create a genuine issue of material fact with respect to Comptech's "dependency" on GECC. As we have explained, there is no evidence that GECC's loans were intended as a method of keeping Comptech deliberately undercapitalized, and if dependency of operations is to be proved solely by the existence of an alleged "agency" relationship between the lender/parent corporation and the officers of the borrower/subsidiary, plaintiffs must submit evidence of far more oversight and control on the part of the principal than

has been done in this case.

E. De Facto Exercise of Control

As we have explained, the "de facto exercise of control" factor is not intended to support liability based on a parent's exercise of control pursuant to the ordinary incidents of stock ownership. Nor may this factor be used to create liability for a lender's general oversight of its collateral. The factor is appropriately utilized, however, if the parent or lender was the decisionmaker responsible for the employment practice giving rise to the litigation. Further, because the balancing of the factors is not a mechanical exercise, if the de facto exercise of control was particularly striking – for instance, were it effectuated by "disregard[ing] the separate legal personality of its subsidiary," *Esmark, Inc. v. NLRB*, 887 F.2d 739, 757 (7th Cir. 1989) – then liability might be warranted even in the absence of the other factors.

In support of its allegations of "de facto" control by GECC, the plaintiffs continue to point to GECC's general monitoring of Comptech; the fact that GECC's approval was required under the loan agreements for a number of projects involving Comptech's finances, budgeting, and gECC's collateral; the relationship among GECC, Villa, and Gaffney; and the fact that Comptech ultimately closed as a result of GECC's decision to call the loans. *See* Part I, *supra*. Although, for the reasons discussed above, we do not find GECC's monitoring of Comptech's finances or its relationship with Villa and Gaffney particularly probative, we are given pause by the extent of GECC's involvement in the decision to close the plant.

Comptech was kept operational for three years solely as a result of GECC's own decision to hold on to Comptech and ensure the company's return to profitability. During this time, Comptech was almost always behind in its payments to GECC, and was only able to survive by GECC's extension of due dates and additional financing. Therefore, for three years, GECC was aware that its funding was the only thing keeping a troubled company afloat. It continued to invest, but when it finally concluded that Comptech could not be saved, it immediately made the decision, according to its internal documents, not to "refuse[e] to loan additional working capital," *Adams v. Erwin Weller Co.*, 87 F.3d 269, 273 (8th Cir. 1996), but instead to "liquidate the company" – thus forcing Comptech to close its doors two weeks later. The decision is thus arguably less like a subsidiary's independent choice to terminate its business in the face of severe cash constraints than like the decision of a WARN Act employer to close a single site of its operations.[11]

On the other hand, the evidence also demonstrates that even before GECC decided to withdraw its support, Comptech was contemplating closure and seeking legal advise as to its labor obligations. Comptech's repeated requests for financing, coupled with its warnings to GECC that it would

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[11]Such a conclusion is strengthened by the fact that, although in may disputes arising under labor legislation, the acts giving rise to liability are likely to be ones that are controlled at the "local" level (for instance, acts of discriminatory hiring), the very nature of the acts that give rise to WARN Act liability (a plant closure) are likely to result from decisions made from the highest levels within the corporate structure, rendering an examination of a parent corporation's role in the decision more important.

be forced to shut down without further cash infusions, demonstrate that Comptech was acting as an independent entity seeking further capital rather than as a branch of GECC operating under GECC's direction. In the absence of other indicia of a unified status between GECC and Comptech, we cannot conclude that the evidence supports an inference that GECC's decision to accept Comptech assets as collateral on the loans manifested a "de facto exercise of control" equivalent to an employer's decision to close a work site.

To be sure, the distinction between a decision to call a loan and a decision to shut down a company is a fine one, and the fact that GECC in some sense "owned" Comptech at the time of closure renders the distinction finer still. But the business of judging is, in considerable measure, on of line-drawing. While the demarcation here is not clear, indeed is quite close, we think it falls on GECC's side of the line. We acknowledge that large lenders – whether or not they are also parents – cannot help but be aware of the consequences of their decisions to foreclose and dispose of collateral; in other areas of the law, a party is "presumed to intend all the natural and probable consequences flowing from his deliberate acts." *United States v. Applewhite,* 195 F.3d 679, 690 (3d Cir. 1999) (quotations omitted). However, we must be scrupulous in our efforts to distinguish between situations in which a parent/lender has ultimately assumed responsibility for the continuing viability of a company (thus incurring liability for WARN Act violations) and situations in which the borrower has retained the ultimate responsibility for keeping the company active.

Here, Comptech's independent research into its legal obligations, its negotiations with GECC, and its attempts to

secure additional financing all reflect Comptech's own vitality, and demonstrate that GECC's decision to cut off its funding was not a "de factor exercise of control" over Comptech's decision to close its doors. After consideration of all of the evidence, we concluded that the plaintiffs have not created a genuine issue of material fact as to whether GECC exercised "de facto" control over Comptech generally, or by virtue of its calling of the loan, and thus this factor weighs in favor of the defendant.[12]

F. Summary

The DOL factors, like the integrated enterprise test, require that two corporations be "highly integrated with

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[12]Plaintiffs argue that the doctrine of issue preclusion bars GECC from denying that it exercised control over Comptech ever since the 1991 foreclosure. At that time, GECC moved in the District Court for the Northern District of Illinois to enjoin the former Comptech directors from filing bankruptcy. In granting the motion, the court concluded that under the loan agreements, GECC had the right to elect a new board of directors upon a default, that GECC could only hope to recoup its investment in Comptech if the business continued as a going concern, and that if the former directors were to file for bankruptcy, GECC would be irreparably harmed. *See General Elec. Capital Corp. v. Chicago Plastics Prods. Ltd. P'shit*, No. 91C4291 (N.D. Ill. July 10, 1991). As the District Court in this action properly concluded, the Illinois court did not purport to hold that gECC exercised "control" over Comptech at all, much less the nature and degree of control relevant to an assessment of WARN Act liability. *See Pearson v. Component Tech. Corp.*, 80 F. Supp. 2d 510, 526 (W.D. Pa. 1999). Thus, issue preclusion is inapplicable. *See Temple Univ. v. White*, 941 F.2d 201, 212 (3d Cir. 1991).

respect to ownership and operations" before they will be considered a single employer for WARN Act purposes. *Armbruster v. Quinn,* 711 F.2d 1332, 1338 (6th Cir. 1983) (quotations omitted). The evidence proffered by the plaintiffs simply does not establish the high degree of integration required by the analysis set forth in this opinion. Though GECC may have monitored much of the activity at Comptech, there is no question that at all times Comptech remained an entirely separate business entity that did not rely on GECC to supply it with personnel, equipment, facilities, clients, administrative services, or any of the other various resources typically "shared" between companies that are ultimately found liable for each others' debts. And, as we have discussed there is a dearth of evidence to support the plaintiffs' theory that gECC effected a pervasive control over all of Comptech's functioning by virtue of its relationship with Comptech's CEOs.

Although the plaintiffs have created a genuine issue of fact with respect to GECC's ownership of Comptech, they have failed to meet their burden with respect to the other facets of the DOL test. The existence of an "agency" relationship between GECC and Comptech's CEOs would not establish the existence of "common directors and/or officers," and, without evidence establishing not only that an agency relationship existed, but also the scope of that relationship, the plaintiffs cannot rely on the "agency" theory to establish "dependency of operations." Additionally, under the circumstances presented here, GECC's decision to call its loan does not give rise to an inference of "de factor exercise of control." Finally, the plaintiffs have not put forth any additional facts not included in the DOL factors that bear on the question of GECC's liability. Therefore, the District

Court's grant of summary judgment to GECC will be affirmed.[13]

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[13]In their final attempt to evade summary judgment, plaintiffs argue that the District Court erred in excluding (without first conducting an *in limine* hearing) the expert affidavit of Thomas Myers. Myers, a qualified authority on banking practices and bank fraud, attested that in his opinion, GECC "substantively operated" Comptech after the foreclosure, and that the controls it exercised over Comptech "were not primarily limited to the financial controls normally exercised in a typical debtor/creditor relationship." The District Court concluded on the basis of the transcript of an eight-hour deposition that Myers's lack of familiarity with Comptech corporate structure, coupled with his lack of familiarity with aspects of the loan agreement between gECC and Comptech, rendered his opinion lacking in a sufficient factual basis to be relevant to the plaintiffs' case. *See Pearson*, 80 F. Supp. 2d at 529. We review a district court's decision to conduct a hearing regarding the reliability of expert evidence, as well as its decision to admit or exclude such evidence, for abuse of discretion. *See Oddi v. Ford Motor Co.*, 234 F.3d 136, 154 (3d Cir. 2000).

As we have discussed above, WARN Act liability does not turn on whether a party is a "parent" or a "lender," or whether a "lender" behaved in typical fashion. Indeed, we have already acknowledged that gECC may well have been a parent of Comptech. Thus, because we have declined to create separate standards of liability for lenders and parents, regardless of whether the District Court was correct in concluding that Myers's affidavit was lacking in a factual basis, his opinion was ultimately not germane and no hearing was necessary. *Cf. Padillas v. Stork Gamco, Inc.*, 186 F.3d 412, 418 (3d Cir. 1999) (holding that *in limine* hearings are encouraged when courts are concerned with the factual, rather than legal, dimensions of the evidence). We therefore affirm the District Court's decision to exclude the

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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affidavit.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[Filed _____]

No. 94-293 Erie

THOMAS PEARSON, JOHN KOWALSKI and on behalf of themselves and all others similarly situated,	)
Plaintiffs,	)
v.	)
COMPONENT TECHNOLOGY CORPORATION, a/k/a COMPTECH, a corporation, GENERAL ELECTRIC CAPITAL CORPORATION, a corporation, and TIFD VII-R, Inc., a corporation,	)
Defendants	)

OPINION

This class action is one of several pieces of litigation resulting from the closure of the Component Technology Corporation plant ("Comptech") in Millcreek, Pennsylvania on October 14, 1994. The plaintiff class alleges that defendants General Electric Capital Corporation ("GE Capital"), and its subsidiary, TIFD VII-R, Inc. ("TIFD"), (collectively "the GE Capital defendants"), had a duty to provide Comptech's employees with a sixty day notice of the closing as required by the Worker Adjustment Retraining Notification Act, 29 U.S.C. §2101, et seq. ("the WARN Act").[14]

The GE Capital defendants deny liability, asserting that they were not employers within the meaning of the WARN Act, and did not function as Comptech's parent or alterego. GE Capital maintains that at all times it was acting in its capacity as a secured lender.

Before the Court are motions for summary judgment filed by the defendants (Doc. 84), and for partial summary judgment on the issue of liability by the plaintiff class (Doc. 93). Disposition of these motions requires that we determine whether, and under what circumstances, a lender may be considered an employer for purposes of liability under the WARN Act, which are questions of first impression in this circuit.

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[14]By Order dated May 30, 1995, the Court entered a default judgment against defendant Comptech, which is currently in bankruptcy.

For the reasons set forth below, we will deny the plaintiffs' motion and grant summary judgment in favor of the defendants.

I. Factual Background

Comptech, a Delaware corporation with its headquarters in Erie, Pennsylvania, was in the business of designing custom injection molds and assembling precision plastic parts for business machines. GE Capital's involvement with Comptech began in June of 1989, when it entered into a loan agreement with Chicago Plastic Products Corporation ("Chicago Plastics"), Comptech, and Comptech's wholly-owned subsidiary, R&R Plastics Corporation (R&R Plastics") (collectively "the borrowers"). The loan was evaluated and approved by the Chicago office of GE Capital's Corporate Investment Financing division, and was used to finance Chicago Plastic's acquisition of Comptech and R&R Plastics. Pls.' Ex. 77.

A security for a loan of approximately $25,000,000, GE Capital received pledge agreements from the borrowers' shareholders for all of the borrowers' stock, which included the right to vote that stock in the event of a default.

Chicago Plastics was in default by mid-1990, and GE Capital notified Chicago Plastics that these defaults would not be waived. On July 10, 1991, GE Capital declared that Chicago Plastics' obligations were due and owing, and exercised its rights under the loan agreement to vote the borrowers' stock. In accordance with that agreement, GE Capital replaced the board of directors of each borrower, and the new boards elected officers. Thomas Gaffney was elected

to head Comptech's new management team as CEO and chairman of the new board of directors. Gaffney, who had extensive experience in the plastics industry, was hired pursuant to a consulting agreement. Pls. Ex. 13. Gaffney appointed Richard H. Brooks, who was already serving as Comptech's executive vice-president, to serve as the company's president.

GE Capital also took an additional step on July 10, 1991 to secure its investment. Concerned that Comptech's former board of directors would initiate bankruptcy or receivership proceedings, the lender filed a motion for a temporary restraining order in the United States District Court for the Northern District of Illinois (Civil Action No. 91-C-4291). That court granted GE Capital's motion, and enjoined Comptech from filing for bankruptcy or receivership. Pls.' Ex. 162.

Beginning in late 1991 or early 1992, the Jeanette Chen began to manage the Comptech account for GE Capital. Chen. Aff. at ¶5. At that time, Chen was a vice president in the portfolio group at GE Capital, and was responsible for monitoring numerous accounts. Chen Aff. at ¶4. In March of 1992, Chen wrote an internal credit memorandum which explained the history of GE Capital's loans to Comptech, and proposed restructuring the account. Pls.' Ex. 2. Chen's memorandum included a proposed merger and acquisition strategy, which she believed would help to expand Comptech's customer base and enhance its profitability. Pls.' Ex. 2.

In March of 1992, as outlined in Chen's memo, GE Capital restructured its loans. The lender wrote off in excess

of $20,000,000 of Comptech's debt obligations, and restructured the remaining debt as three term loans, a revolving line of credit, and preferred stock. As security for its loans, under the reorganization GE Capital received 4000 shares of preferred stock, had a 100% pledge of Comptech stock, and had the right to take control of the Board of Directors after two dividend payments were missed.

The terms of the agreement ("the Loan Agreement")[15] include a number of provisions which were designed to protect GE Capital's investment. Most germane to the issues before us, under the "Negative Covenants" set forth in Section 7, the lender's approval was required before Comptech or a subsidiary could enter into any of the following transactions: merging with or acquiring another company; investing or making loans; incurring additional indebtedness; selling or transferring properties encumbered by the liens which secured GD Capital's loans, in excess of $50,000 aggregate value per year; changing the company's capital structure; creating any new liens on secured property or assets; making capital expenditures in excess of an annual approved amount; or paying annual compensation in excess of $100,000, except to certain employees. Pls.' Ex. 100 at 45-71.

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[15] During the course of the relationship between GE Capital and Comptech, the loan agreement between the parties was modified several times in ways that, unless noted herein, have no bearing on our decision here. The parties have provided us with the Amended and Restated Loan Agreement dated June 5, 19992 (Pls.' Ex. 100, Defs.' Ex. 1), and we will refer to this agreement as the Loan Agreement throughout this opinion and make citations to it.

The Loan Agreement also defined events of default, and provided that, in the event of a default, the lender could terminate any further revolving credit advances, and declare all outstanding obligations due and payable. Pls.' Ex. 100 at 76.

Thomas Gaffney's consulting contract was renewed, and he was again indemnified from liability as a shareholder and as chairman of the board of directors. Pls.' Ex. 11. Gaffney and Brooks purchased all of Comptech's common stock. On March 31, the Amended and Restated Certificate of Incorporation for Comptech, a Delaware corporation, was recorded. Pls.' Ex. 45.

Comptech made arrangements to acquire Accu-Form, Inc. ("Accu-Form"), a plastic injection molder specializing in medical, pharmaceutical, and electronic parts. Comptech, R&R Plastics, Accu-Form, and Frances W. Czulewicz, who was Accu-Form's sole shareholder and CEO, entered an Acquisition Agreement, in which the parties agreed that Accu-Form and R&R Plastics would merge. Pls.' Ex. 146.

Since GE Capital held a security interest in R&R Plastics, the lender had to approve that merger. An Amended and Restated Loan Agreement was entered on June 5, 1992, which essentially acknowledged that R&R Plastics as a party in the loan documents. The amended agreement gave GE Capital a security interest in Accu-From to secure R&R's indebtedness. Pls.' Ex. 100.

With the new Loan Agreement in place, Comptech continued designing and marketing injection molds and GE Capital provided funding to finance the plant's operation. GE

Capital, and particularly Jeanette Chen, closely monitored the Comptech account, and there is an extensive record of correspondence between the lender and borrower. On occasion, GE Capital made decisions to extend financing even though no payments had been made, and waived penalty interest on the unpaid loans. *See e.g.* Pls.' Ex. 8, 10. In accordance with the Loan Agreement, Comptech frequently had to request that the lender assent to certain business plans and arrangements where the plans would affect GE Capital's security interest.

In the fall of 1993, Comptech created a new subsidiary, Comptech de Mexico, S.A. de C.V. ("Comptech de Mexico") at the suggestion of one of its major customers, Mars Electronics, which was moving its manufacturing facility to Mexico. Mars agree to provide start-up financing for the company, and Comptech negotiated with Mexican financial institutions regarding a loan for working capital. In addition, Comptech provided certain equipment to the venture. Comptech also negotiated the purchase of Phoenix International, a Mexican company, in connection with Comptech de Mexic. Pls.' Ex. 147.

Since the Loan Agreement required GE Capital's assent before Comptech could transfer any equipment in which the lender held a security interest, or before it could create a subsidiary corporation, GD Capital's assent was necessary before the Comptech de Mexico plan could be implemented. An amendment to the Loan Agreement was executed on November 23, 1993. Pls.' Ex. 153. In that document, the circumstances of Comptech de Mexico's creation were set forth, and GE capital agreed to release its security interest in the equipment and to waive or amend

certain provisions of the Loan Agreement. Comptech held 85% of its new subsidiary's stock, and pledged those shares to GE Capital as security on its loan. Pls.' Ex. 132.

In January of 1994, Comptech negotiated the sale of the remaining assets of its subsidiary, R&R Plastics, to Fulton Industries, and used the proceeds to prepay its term debt to GE Capital in accordance with prepayment provisions of the Loan Agreement. Pls.' Ex. 104.

Comptech continued to explore ways to expand its customer base and to reduce is operating expenses. For example, it proposed consolidating Comptech's and Accu-Form's manufacturing operations in a single new building. In developing this plan, Comptech negotiated with the companies' existing landlords, as well as with contractors for bids on a new facility. Pls.' Ex. 155. At times, the company also made decisions to update its equipment, which was financed by USL Capital, another lender. Pls.' Ex. 134.

In the spring of 1994, Gaffney, acting as chairman of the board, fired Brooks as Comptech's president and replaced him with Charles V. Villa. On May 16, 1994, Villa sent Chen a detailed update on Comptech's business plans, and asked for additional funds to cover operational losses and to finance new equipment. Pls.' Ex. 7.

In June of 1994, Gaffney and Brooks sold all of their Comptech stock to Villa, and Gaffney resigned. GE Capital had a call on all of Villa's shares of Comptech stock.

By late summer, it appears that Comptech was at least contemplating that the plant might have to be closed.

Comptech asked its attorneys for advice as to whether it had an obligation to provide notice to the plant's employees before closing the facility. In a memo dated August 29, 1994, Comptech's attorney advised that, as the employer, Comptech would be obligated to give sixty days notice under the WARN Act. Pls.' Ex. 16.

On September 24, 1994, Comptech and Accu-Form notified GE Capital that they needed an additional $2 Million in working capital in order to continue operations for the remainder of 1994. Pls.' Ex. 21. They were informed that the lender would not provide further funds. In an internal memo dated September 30, 1994, Chen recommended that GE Capital liquidate Comptech's assets as partial payment on the outstanding loans. Pls.' Ex. 4.

Comptech was also seeking financing from other sources, and Villa had discussions with CitiBank Venture Capital Limited regarding securing the $2 million needed to continue to operate Comptech through 1994.

In a letter to Ed Christie, GE Capital's senior vice president of Portfolio Development and Support, Comptech's sales director, Henry Makie, pleaded with the lender to continue to provide financing, and stated that "our management is working to complete a transfer sale to another financial entity." Pls.' Ex. 36. However, GE Capital decided not to extend further credit, and to accept Comptech's liquidated assets as collateral on unpaid loans. By early October, the outstanding principal balance on Comptech's loans was $6,650,000. Pls.' Ex. 24.

TIFD VIII-R was incorporated to conduct the

liquidation, and GE Capital assigned its rights in the collateral to TIFD. Pls.' Ex. 113. Negotiations ensued between counsel for the creditor and counsel for Comptech, and drafts of the proposed agreements were circulated on October 11 and 12, 1994. These documents were drafted in accordance with Pennsylvania UCC §9-505(b). They included an Asset Turnover Agreement, Pls.' Ex. 160, an Asset Retention and Purchase Agreement, and a Supplemental Funding Agreement to fund the wind-up costs, including accrued employee wages and benefits. The agreements were signed on October 13, 1994.

On October 14, Comptech's employees learned that the plant was closing, effective immediately, when Charles Villa posted the closing notice. Pls.' Ex. 50. Paragraph 6 of the notice gave this explanation fo the closing:

> VI. The unexpected temporary separation occurred on October 13, 1994 when General Electric Credit Corporation refused to extend additional financing to Component Technology Corp. ("Company") and withdrew current funds. Since the unexpected temporary closing yesterday, it has become apparent that the Company will not be financially able to reopen and that the closing will most likely be permanent. This notice was not provided sixty (60) days prior to the plant closing because the Company also believed that giving the required notice would have precluded the Company from obtaining the needed financing which would have been sufficient to avoid or postpone the shutdown.

Pls.' Ex. 50.

As agreed, Comptech turned over the assets pledged as collateral to TIFD, which conducted a liquidation of the assets. TIFD also attempted to fill outstanding orders. The proceeds partially satisfied Comptech's obligations to GE Capital, and the lender wrote off the balance of the debt in 1996.

This action, brought by former Comptech employees against Comptech and the GE Capital defendants, followed.

II. Summary Judgment Standard

Summary judgment is proper where there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Childers v. Joseph, 842 F.2d 689 (3d Cir. 1989). "Rule 56 mandates the entry of summary judgment, after a adequate time for discovery and upon motion, against the party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A court considering summary judgment must examine the entire record in the light most favorable to the nonmoving party, and draw all reasonable inferences in its favor. Anderson v. Liberty Lobby, 477 U.S. 242 (1986).

III. Analysis

The WARN Act requires employers of 100 persons or more to give their employees sixty days written notice prior

to a plant closing or mass layoff. 29 U.S.C. §2102(a). An employer who violates WARN, and who is not protected by certain narrowly-construed exceptions, is liable to each aggrieved employee for back pay and benefits. 29 U.S. C. §2102(a)(1). It is clear to us that the factual background of the Comptech closing establishes the essential elements of a WARN cause of action. It is undisputed that the closing of the Comptech facility was a "plant closing," which constituted a "WARN event" and caused an "employment loss" to the requisite number of employees. Comptech notified its employees of the closing on the same day the plant ceased operation, and thus provided insufficient notice under WARN Act.

As previously noted, we have entered a default judgment against the employer on the charges contained in the complaint. The sole question before us today is whether WARN liability attaches to the remaining defendants to this lawsuit, the GE Capital defendants, as "employers" under the statute, so that they may be held liable for Comptech's failure to notify its employees as the Act requires.

Plaintiffs contend that we must grant summary judgment in their favor under three different theories, each of which is premised on GE Capital's alleged control over Comptech: (1) they contend that GE Capital is liable as a matter of law because it held the voting rights to all of Comptech's stock after June 22, 1994; (2) they argue that GE Capital is liable as a WARN employer under general principles of corporate law, because it was Comptech's parent corporation and owner, or because it acted as Comptech's alter ego; and (3) they assert that GE Capital is directly liable as an "employer" under the WARN Act because of the degree

of control it exercised, through the loan documents, over Comptech. We will address these arguments *seriatim.*

A. Lender Liability Under WARN

Before turning to the plaintiffs' theories of liability, however, we must first consider whether such liability may attach to a creditor such as GE Capital. The Court of Appeals of the Third Circuit has not yet decided whether a secured creditor may be considered an employer under the WARN Act, and, if so, what the threshold for such liability might be.

The Act itself clearly holds only the employer liable for a failure to warn. In deciding whether a secured creditor may fall under the statutory definition of "employer," we look first to the plain language of the statute, which provides as follows:

> (1) the term "employer" means any business enterprise that employees –
>
> (A) 100 or more employees, excluding part-time employees; or
>
> (B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of house of overtime);

29 U.S.C. §2101(a)(1).

Thus, the statute's definition of "employer" considers only the size of the workforce, and does not contemplate the sorts of entities which might, under certain conditions, assume employer status under the Act.

Since the statutory language alone fails to satisfy our inquiry, we turn to the Department of Labor's ("DOL") final regulations and commentary. Agency interpretation is accorded deference when courts are deciding the meaning or reach of a statute. Chevron, USA, Inc. v. Natural Resources Defense Council, inc., 467 U.S. 837, 843-44 (1984). Here, the agency's regulations do not directly speak to whether a secured creditor may be considered a WARN employer. However, they do address a somewhat analogous situation where a fiduciary or trustee in a bankruptcy action takes possession of a debtor's business assets. The DOL's commentary states that under certain conditions, liability as a WARN employer attaches to the trustee:

> DOL agrees that a fiduciary whose sole function in the bankruptcy process is to liquidate a failed business for the benefit of creditors does not succeed to the notice obligations of the former employer because the fiduciary is not operating a "business enterprise" in the normal commercial sense. In other situations, where the fiduciary may continue to operate the business for the benefit of creditors, the fiduciary would succeed to the WARN obligations of the employer precisely because the fiduciary continues the business in operation.

54 Fed. Reg. 16,045 (1989).

Thus, the agency's interpretation of the statute indicates that WARN liability may attach to an entity other than the employer.

To date, only two courts of appeals that have considered whether a secured creditor such as GE Capital may be held to employer liability under WARN. *See* Adams v. Erwin Weller Co., 87 F.3d d269, 271 (8th Cir. 1996); Chauffeurs, Sales Drivers, Warehousemen & Helpers Union Local 572 v. Weslock Corp., 66 F.3d 241, 244 (9th Cir. 1995). In the view of the Ninth Circuit, a lender acts as an employer when it operates the borrower's assets as a "business enterprise" in the "normal commercial sense." Weslock, 66 F.3d at 244 (quoting 54 Fed. Reg. 16,045 (1989). The Eighth Circuit adopted that holding, finding that "only when a lender becomes so entangled with its borrower that it has assumed responsibility for the overall management of the borrower's business" will the degree of control necessary to consider a secured creditor as an employer have been reached. Adams, 87 F.3d at 272.

We are in agreement with these jurisdictions that WARN's obligations can attach to a secured creditor, and that there is a point at which the actions taken by a lender to secure its investment exhibit such a high degree of control over the debtor corporation that the creditor assumes the overall management of the business.

Thus, our reading of the statute together with the DOL commentary leads us to conclude, in accordance with Weslock and Adams, that under some circumstances a secured creditor such as GE Capital may incur liability as an employer under WARN, and may be held responsible for a failure to provide the affected employees with the required sixty days notice of a plant closing.

We turn now to the inquiry which logically follows

this determination: does such liability attach to defendant GE Capital, under the circumstances presented by this case?

B. Liability under Board of Trustees of Trucking Employees v. Centra

The plaintiffs' first theory of liability asserts that the defendants are directly liable as a matter of law because they possessed an unconditional right to vote Comptech's stock as of June 22, 1994, the date on which GE Capital gained a bring-along call on Villa's stock, and thus controlled the company. Plaintiffs contend hat Board of Trustees of Trucking Employees v. Centra, 983 F.2d 495 (3d Cir. 1992), establishes their position as a matter of law.

Plaintiffs' reliance on this case is misplaced. The questions in Trucking Employees was whether Centra, the employer, was in "common control" with another corporation, and thus was required to make contributions to the multiemployer benefit plan from which the other corporation had withdrawn. Making this determination required the court to interpret the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §1381 et seq., which amended provisions of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001 et seq. The court held that, under ERISA, a corporation controls another corporation when it owns eighty percent of the total value of all outstanding shares of stock. Trucking Employees, 983 F.2d at 502. The court further held that holding stock options constitutes constructive ownership of the stock for ERISA purposes. Id.

We do not find this a controlling principle of law for

determining whether a lender, holding stock or stock options as security for its loans, controls the borrower so as to incur liability as a WARN employer. Plaintiffs' motion for summary judgment, insofar as it premised upon this theory, is without merit and will be denied.

C. Liability under General Theories of Corporate Law

Plaintiffs also contend that GE Capital is liable as a WARN employer under general principles of corporate law: specifically, a parent corporation's liability for the actions of its subsidiary, and a controlling corporation's liability under the instrumentality and alter ego theories.

i. Comptech was not GE Capital's Subsidiary

The argument presented in the plaintiffs' submissions rests upon an assertion that Comptech was a subsidiary of its lender. Pls.' Br. (Doc. 94) at 58. The plaintiffs then conclude that, under the tests set out in Local 397 v. Midwest Fasteners, Inc., 779 F. Supp. 788 (D.N.J. 1992), we must find that parent GE Capital is liable, under WARN, for the acts of its subsidiary. Pls.' Br. (Doc. 94) at 58-85. Plaintiffs' entire argument in this regard is premised upon the existence of a parent-subsidiary relationship for which it has no proof.

The question before the Midwest Fasteners' court was whether, under WARN, a parent corporation could be held liable for the actions of a subsidiary. Liability alone was at issue; it was undisputed that defendants were a parent corporation and three subsidiaries. Id. at 796. Thus, the case does not address whether the connection between a secured

lender and its creditor, should be analyzed as a parent/subsidiary relationship.

Which rules of law to apply in determining whether the parent could be held liable was a question of first impression for the Midwest Fasteners' court, and it decided that the analysis should proceed under three distinct standards: (1) the Third Circuit's common law alter ego doctrine, also known as piercing the corporate veil; (2) the "single employer" theory as developed in federal labor statutes; and (3) the five-factor test set out by the DOL in 20 C.F.R. §693.3(a)(2).

The Midwest Fasteners' court then considered whether the operations of the parent and the subsidiary were so interrelated that the parent should be found liable as a WARN employer. Applying each test separately to the facts of the case, the court considered whether each analysis favored the plaintiffs or the defendants; ultimately, under the totality of the circumstances, the court held that the parent corporation was liable.

Midwest Fasteners, then, stands for the proposition that a parent may be held liable as a WARN employer when a subsidiary closes a plant without providing notice, and sets forth the proper analytical framework for assessing such liability.

Although the plaintiffs here accurately set out the appropriate standards to apply in a parent/subsidiary case, they have failed to provide credible evidence from which to conclude that Comptech was GE Capital's subsidiary in the first place. The plaintiffs' sole evidence of Comptech's

subsidiary status is a definition of "subsidiary" taken from 15 Pa. C.S.A. §2542, which governs the establishment and conduct of registered corporations in Pennsylvania. This statute reads, in pertinent part:

> **"Subsidiary."** Any corporation as to which any other corporation has or has the right to acquire, directly or indirectly, through the exercise of all warrants, options and rights and the conversion of all convertible securities, whether issued or granted by the subsidiary or otherwise, voting power over voting shares of the subsidiary that would entitle the holders thereof to case in excess of 50% of the votes that all shareholders would be entitled to cast in the election of directors of such subsidiary, except that a subsidiary will not be deemed to cease being a subsidiary as long as such corporation remains a controlling person or group within the meaning of this subchapter.

15 Pa. C.S.A. §2542.

Plaintiffs' argument appears to be that GE Capital was

Comptech's parent because it possessed the call rights to Comptech's stock as security for its loans. We do not read this portion of Pennsylvania's corporations law as applying to the relationship between a secured lender and a debtor corporation, and we note that the plaintiffs have not provided any cases supporting their position. Since there is no evidence that GE Capital was Comptech's parent, we need not apply the multi-faceted analysis set forth in Midwest Fasteners for piercing the corporate veil under such a scenario. Plaintiffs' motion for summary judgment will be denied insofar as it is premised upon a parent-subsidiary relationship.

ii. Lender Liability and Piercing the Corporate Veil

We are well aware, however, that a small number of courts have applied piercing the veil jurisprudence to the relationship between a borrower and a lender, in a context other than that of a parent corporation and its subsidiary. These cases, whether analyzed under the alter ego theory or the instrumentality doctrine, focus on the excessive and inequitable use of control by a dominant corporation over an allegedly subservient one. Courts as well as commentators have recognized that the degree of control necessary to require the setting aside of the corporate construct, may at times arise from the economic power of a lender and the corresponding economic dependence of a borrower.

As one commentator has explained, "[w]hen the borrower is in default, the previous arm's-length relationship may be transformed into a comparable patter of domination and subservience with the bank utilizing its superior economic power over a borrower to influence, if not dictate, major

decisions of the borrower."[16] The questions then arises whether the lender's participation in the borrower's decisionmaking process has reached such a degree that it has legal consequences. Id. Reported cases applying this theory are rare, and have involved the lender's alleged responsibility for the borrower's debts,[17] most often in the context of equitable subordination of bankruptcy,[18] as well as a lender's statutory liability with respect to the borrower's property in actions brought under the Comprehensive Environmental Response, Compensation, and Liability Act. 42 U.S.C. §§9601 *et seq.* (1994) ("CERCLA").[19] Although we have found no case in which this analysis has been used to determine lender liability under the WARN Act, given our conclusion that a secured lender may be liable as a WARN employer, we think it prudent to address all relevant theories of potential liability.

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[16]Phillip I. Blumberg & Kurt A. Strasser, The Law of Corporate Groups: Enterprise Liability in Commercial Relationships, Aspen Law & Business 560 §15.01 (1988).

[17]See, e.g. *Valdes v. Leisure Resource Group, Inc.*, 810 F.2d 1345 (5th Cir. 1987); Krivo Industrial Supply Co. v. National Distillers & Chemical Corp., 483 F.2d 1098 (5th Cir. 1973), *modified factually* 490 F.2d 916 (5th Cir. 1974).

[18]In re M. Paeolla & Sons, Inc., 161 Bankr. 107 (E.D. Pa. 1993); Markowitz v. Heritage, 25 Bankr. 963 (Bankr. D.N.J. 1982).

[19]United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991); Guidice v. BFC Electroplating & Mfg. Co., Inc., 732 F. Supp. 556 (W.D. Pa. 1989).

Whether GE Capital took total and actual control over Comptech, so as to function as Comptech's alter ego or to make Comptech the lender's instrumentality, is a question of law for the courts to decide. McFadden v. Baltimore Contractors, Inc., 609 F. Supp. 1102, 1104 (E.D. Pa. 1985). It is the plaintiffs' burden to show that the corporate veil in this case should be pierced, and that we should hold GE Capital liable for Comptech's own failure to give its employees the sixty days notice of a plant closing that is required under WARN.

Ordinarily, a lender does not owe a fiduciary duty to a borrower. Blue Line Coal Company, Inc. v. Equibank, 683 F. Supp. 493, 496 (E.D. Pa. 1988), citing Federal Land Bank v. Fetner, 410 A.2d 344 (Pa. Super. 1979). We note that courts have been extremely reluctant to pierce the corporate veil in lender liability cases, and have permitted lenders to engage in a broad range of conduct to protect their investments without equating such financial controls with the degree of control necessary to impart liability to the lender as the dominant corporation.

For example, allowing the creditor's agent to negotiate settlements and claims, and to designate the order in which other creditors were paid, does not show that the lender had actual control over the debtor. Krivo, 483 F.2d 1098, 1111. Similarly, monitoring the borrower's operations and offering management advise is not sufficient control to incur liability. In re W.T. Grant Co., 699 F.2d 599, 610-11 (2d Cir. 1983), *cert. denied* 464 U.S. (1983); Krivo, 483 F.2d at 1105; Temp-Way Corp. v. Continental Bank, 139 B.R. 299, 318 (E.D. Pa. 1992). Taking an active part in managing the borrowing company, without more, is not total and actual

control. Requelme Valdes v. Leisure Resource Group, Inc., 810 F.2d 1345 (5th Cir. 1987) (no actual control even though creditor had to approve debtor's business expenses); Chicago Mill & Lumber Co. v. Boatman's Bank, 234 F.41 (8th Cir. 1916) (no actual control even though creditor corporation elected one of its employees as president of the debtor corporation and gave management directives); McFadden, 609 F. Supp. at 1105 (no actual control even though surety company gave instructions to subcontractors, required complete access to books, and required debtor to pay over all receipts).

iii. Comptech was not GE Capital's Instrumentality

Krivo is the leading case on whether a creditor corporation may be held liable for the obligations of a debtor corporation under the instrumentality doctrine. 483 F.2d 1098. Under Krivo, a lender may be found liable for the obligations of a subservient debtor corporation where "it misuses that corporation by treating it, and by using it, as a mere business conduit for the purposes of the dominant corporation." Id. at 1102. Under this theory, the dominant corporation may be liable if it is so involved with the debtor that it is in fact managing the debtor's affairs. Id. at 1104. Courts applying the instrumentality rule to a debtor-creditor relationship have required a strong showing that "the creditor assumed actual, participatory, total control of the debtor." Id. at 1105. Where liability has been found, it has been based on a finding "that the subservient corporation in reality had no separate, independent existence of its own." Id. at 1105. It has long been recognized that "it is not 'controlling influence' that is essential. It is actual control of the action of the subordinate corporation." Krivo, 483 F.2d at 1106, quoting

In re Kentucky Wagon Mfg. Co., 3 F. Supp, 958, 963 (W.D. Ky. 1932), *aff'd* 71 F.2d 802 (6th Cir.), *cert. denied,* Laurent v. Stites, 293 U.S. 612 (1934).

One commentator has defined this degree of control as follows:

> The control necessary to invoke what is sometimes called the "instrumentality rule" is not mere majority or complete stock control but such domination of finances, policies and practices that the controlled corporation has, so to speak, no separate mind, will or existence of its own and is but a business conduit for its principal.

Krivo, 483 F.2d at 1106, quoting 1 W. Fletcher, Cyclopedia of the Law of Private Corporations §4, 204-205 (perm. ed. rev. 1963).

The plaintiffs point to language in a number of GE Capital's memoranda as proof that the creditor exercised complete control over Comptech's business decisions, and they emphasize that the Loan Agreement required the lender's assent to expenditures which would affect the secured assets. We have previously enumerated these restrictions, and we now find them consistent with the control a lender is entitled to exercise to secure a $24.9 million dollar loan. *See infra* p. 5, *citing* Pls. Ex. 100 at 65-71.

The plaintiffs further assert that because there was regular communication between Comptech and the lender over the issues encompassed by the Loan Agreement, Comptech was being controlled by GE Capital. Certainly the record indicates many instances of communication over a variety of business decisions which could not be undertaken under the Loan Agreement without GE Capital's assent. One of many examples of such communication involved Comptech's proposed management bonus and employee incentive plan, which suggested executive compensation in excess of the cap set in the Loan Agreement. Comptech's CFO, Frank Kerrigan, presented the incentive plan to the lender by letter; Jeanette Chen then summarized the loan history and proposed compensation in a memo to her supervisor, J.M. Greeley, and recommended that Greeley approve the plan with certain restrictions. Pls.' Ex. 52. He did, and Chen so notified Kerrigan. Pls.' Ex. 53. Our reading of the documents submitted by both parties to this dispute shows this to be fairly typical of the exchange between Comptech and GE Capital on matters where Comptech made business decisions on matters that would affect secured assets. The restrictions in the Loan Agreement were the sort of control permitted a secured lender, and do not indicate the degree of control necessary to pierce the corporate veil. This exchange, and the others cited by the plaintiffs in their submissions, simply reflect a major creditor's approval, as required by the Loan Agreement, of a decision which would have a direct impact on the borrower's ability to repay its loans. We have reviewed the numerous instances of such correspondence in this case, and see no evidence that GE Capital was acting in a capacity other than as a secured lender.

In other words, we find no evidence that GE Capital

was impermissibly controlling Comptech's affairs. Furthermore, the record is replete with examples of Comptech's day-to-day management of its own business decisions. Comptech made decisions to buy and sell obsolete equipment, soliciting bids and making arrangements for these transactions. Pls.' Ex. 132. The company purchased new grinding and molding equipment, and financed that purchase through another lender, USL Capital. Pls.' Ex. 134. It entered into a licensing agreement with Grain Tech to produce gas-assisted injection molded parts. Pls.' Ex. 137.

Comptech also created a new subsidiary, Comptech de Mexico, after on of the company's major clients, Mars Electronics, moved its manufacturing facility to Mexico and suggested that Comptech open a plant to handle Mars' business there. In setting up the project, Comptech negotiated with Mexican financial institutions to arrange working capital, and negotiated the purchase of a Mexican company, Phoenix Internations. Pls.' Ex. 147. Closer to home, Comptech proposed consolidating its Millcreek facility with Accu-Form in a new building, and proceeded to negotiate with its landlord and with contractors. Pls.' Ex. 155.

In short, the uncontradicted evidence shows that Comptech made its own decisions regarding products, production, employment, sales, marketing, personnel, creating subsidiaries, and buying and selling equipment. GE Capital did not make these business decisions, even though the creditor's assent was required before Comptech made any changes which involved restrictions in the Loan Agreement. Our thorough review of the record has convinced us that the control GE Capital exercised was in accordance with the Loan Agreement, and was consistent with its role as Comptech's

secured creditor.

Accordingly, we find that the plaintiffs have failed to carry their burden of showing that GE Capital assumed actual, total, participatory control over Comptech, and we reject their argument that the one was simply the instrumentality of the other.

iv. Comptech was not GE Capital's Alter Ego

The plaintiffs also contend that we should pierce the corporate veil under a related control theory, the alter ego theory. In this circuit, the factors to be considered for piercing the corporate veil under an alter ego theory include (q) gross undercapitalization; (2) failure to observe corporate formalities; (3) failure to pay dividends; (4) the insolvency of the debtor corporation; (5) siphoning of funds by the dominant stockholder; (6) nonfunctioning officers or directors; (7) absence of corporate records; (8) intermingling of **(page 24 of opinion missing)**

. . . found one, which suggests that a borrower's inability to pay stock dividends or loan interest is proof that it has been undercapitalized by its lender.

Nor is there any credible record evidence that the corporation failed to observe corporate formalities. In fact, it is clear to us from the record that Comptech's corporate identify was distinct from that of its creditor. Comptech's corporate counsel, Dykema Gosset, issued an opinion letter attesting to Comptech's incorporation under Delaware law. Defs.' Supp. Ex. 21 at 4. Comptech's local counsel, MacDonald, Illig, Jones & Britton, LLP, issued a similar

letter on Accu-Form's behalf. Defs.' Supp. Ex. 22 at 4. these two firms represented Comptech and its subsidiaries at all relevant proceeding, including the negotiations leading to the asset turnover agreement. The defendants, on the other hand, were represented by Sidley & Austin, a Chicago firm, and they retained Knox, McLaughlin Gornall & Sennett, P.C., as local counsel.

The record shows no commingling of funds. Comptech's bank accounts were maintained at PNC Bank, N.A., and no one from GE Capital had the authority to sign checks drawn on these accounts. Chen Aff. at ¶13. Comptech maintained its own accounting department, under the supervision of company controller James Brunk. Comptech generated its own financial statements, and engaged the national accounting firm KPMG Peat Marwichk as its accountants. Burke Dep. at 111. There is no evidence that GE Capital had any role in these internal financial proceedings.

To further their argument that Comptech failed to observe corporate formalities, plaintiffs complain that the defendants have not produced Comptech's corporate documents. It was not GE Capital's burden to produce Comptech's corporate minutes, and we deny this argument as being without merit.

Plaintiffs strenuously argue that Comptech's directors and officers did not function independently, but were directed by GE Capital. As proof, the plaintiffs contend that certain statements made by Thomas Gaffney and Charles Villa, in separate letters to GE Capital, show that the lender, and not Comptech's officers, was in control of the company. This

first letter was written by Gaffney, then Comptech's chairman of the board, to Ed Christie at GE Capital, and is dated March 14, 1994. Pls.' Ex. 14. In that letter, Gaffney outlines Comptech's current business situation. He states that Comptech has increased its sales, engineering, and quality control capabilities, he summarizes cash flow for items outside of normal capital expenditures, and he lists potential new projects with seven separate clients. Gaffney closes with the following: "As you can see from the above, a lot of things are happening at Comp Tech. We need to know what G.E. wants us to do. We are proceeding with items 2, 3, and 4, but we need to get confirmation from G.E. on each one of these items. Obviously, without G.E.'s help we cannot proceed to complete our plans. I am prepared to do whatever G.E. wants relative to Comptech." Pls.' Ex. 14.

The plaintiffs contend that Gaffney's letter, particularly the final statement, is evidence that GE Capital controlled Comptech. We do not agree. Under the terms of the Loan Agreement, GE Capital's assent was required for the aforementioned items 2, 3, and 4; these items pertained to Comptech's acquisition of Accu-Form, and its plans to lease a new building. We read Gaffney's letter as asking for assent under the Loan Agreement to take steps that could affect GE Capital's ability to recover its debt, and as further requesting a waiver of some of the terms of that agreement.

We similarly reject the plaintiffs' reading of Charles Villa's letter to Jeanette Chen, which is dated May 16, 1994. Pls.' Ex. 7. In that letter, Comptech's president outlines the current state of Comptech's business, including revenue loss, increased labor costs and overhead, and weak core customer sales, and he emphasizes the company's need for increased

loans to upgrade its equipment and facilities. Villa beseeches the lender to make more money available, so that Comptech can continue to compete favorably in the industry. "G.E. needs to make decisions now on all the issues outlined in this memo," Villa writes. "How you respond will then dictate what the management of Comptech will need to do to accomplish the task at hand." Pls.' Ex. 7. We read this document as we did Gaffney's letter, as a borrower explaining why it needs more money, and asking that certain decisions, which are required by the Loan Agreement, be made without delay, so that Comptech will know which projects to implement. We do not read this letter as evidence that GE Capital controlled Comptech.

To further their theory that Comptech's officers did not actually control the company, plaintiffs claim that GE Capital manipulated Gaffney's firing and required Comptech to hire Stewart Benton as a consultant. Under the Loan Agreement, consulting agreements required the lender's assent, and we have previously held that the terms of the Loan Agreement were appropriate as security for GE Capital's loans. In her deposition testimony, Jeanette Chen explained that Gaffney had been hired pursuant to a consulting agreement, and when that agreement had reached its end GE Capital did not assent to an extension of his agreement. Chen Dep. at 233. We do not see the circumstances of Gaffney's departure from Comptech as evidence that GE Capital was running the company.

Plaintiffs' also point out that GE Capital used an executive search firm, IMCOR, to identify potential individuals Comptech could retain as consultants, and they offer this as proof of GE Capital's control. Jeanette Chen

testified that GE Capital asked IMCOR to identify possible consultants for Comptech. Chen Dep. at 139-140. IMCOR suggested that Comptech hire Stewart Benton. Id. Benton was hired by Comptech, and not by GE Capital. Id. Benton himself testified that during his time as a consultant for Comptech, he reported directly to Comptech's president, Chuck Villa, and that his activities were not directed by GE Capital. Benton Aff. ¶¶7, 8, 10. In any event, there is no evidence that GE Capital acted in any manner with regard to Benton's employment as a consultant that exceeds the conduct ordinarily permitted a secured lender, since even taking an active role in managing the affairs of the borrowing company is not evidence of lender control. Adams, 87 F.3d at 272; Krivo, 483 F.2d at 1105; McFadden, 609 F. Supp. at 1105.

Not only have the plaintiffs failed to offer proof that GE Capital controlled Comptech so that the latter had no separate identity, but the GE Capital defendants have produced the uncontradicted testimony of Comptech's local managers, some of whom are members of the plaintiff class, that they themselves managed and controlled the corporation. This evidence includes the affidavits or deposition testimony of Charles Villa, Comptech's president; Pal Dier, Comptech's plant manager; Kenneth Thomasetti, vice-president of operations; Henry Makie, Director of sales and marketing; James Brunk, controller and chief financial officer; Douglas Kruse, vice-president of product and corporate development; Genevieve Putnam, director of human resources; and Thomas Pearson, named plaintiff in this action, who was first employed as personnel administrator for Accu-Form, and who testified that, while at Comptech, he was "involved in . . .personnel management, quality control management, purchasing and sales and marketing." Pearson Dep. at 26.

The uncontradicted testimony of these former Comptech managers shows that Comptech's own officers and managers controlled its business and management decisions. We conclude that the plaintiffs have failed to produce any evidence to show that Comptech was controlled by GE Capital instead of by its officers.

The plaintiffs also claim that GE Capital siphoned funds from Comptech. This argument is premised on the fact that, when Comptech sold its subsidiary, R&R Plastics, it used the funds to prepay its debt to GE Capital. The record indicates that Comptech merged R&R Plastics with Accu-Form when it acquired the latter company. Comptech then negotiated and signed a purchase agreement to sell R&R's remaining equipment, machinery, inventory, and real estate to Fulton Industries. Pls.' Ex. 104. Since GE Capital had a secured interest in R&R Plastics, the lender's approval was required under the Loan Agreement before this equipment could be sold. Comptech used approximately $700,000 in proceeds from this sale to comply with prepayment terms in the Loan Agreement and to prepay its term debt to GE Capital. Plaintiffs' reasons for characterizing this as "siphoning funds," are unclear to this Court. In any event, we do not see these transactions as evidence of GE Capital's control over Comptech; if anything, it would seem that Comptech made a sound business decision when it found a buyer for the unneeded assets, and applied the proceeds to a debt it surely owed.

The plaintiffs offer no proof on the final factor in an alter ego analysis, fraudulent intent. They briefly reiterate an assertion made earlier in their brief that GE Capital is "collaterally stopped from asserting that they did not control

Comptech as of July 10, 1991," when it filed its motion for injunctive relief in district court in the Northern District of Illinois. Pls.' Br. at 71. Issue preclusion prevents the relitigation of questions which have been previously determined by another court. It is appropriate only where (1) the identical issue was decided in a prior adjudication; (2) there was a final judgment on the merits; (3) the party against whom the bar is asserted was a party or in privity with a party to the prior adjudication; and (4) the party against whom the bar is asserted had a full and 201, 212 (3d Cir. 1991), *cert. denied.* 502 U.S. 1032 (1992).

We need not engage in a full analysis of the preclusion doctrine, since the plaintiffs have failed to meet the first prong of the test. The Illinois court was faced with an entirely different issue than the one which must be determined here. The question before that court was whether, after the borrowers defaulted and replaced the boards of directors of the debtor corporations in accordance with provisions in the loan documents, the creditor was entitled to enjoin the former boards of directors from bringing bankruptcy proceedings. The district court determined that, under the loan agreements, GE Capital was entitled to take the actions it had taken, and the court granted the lender's motion for injunctive relief. Contrary to the plaintiffs' argument here, the Illinois court did not determine that GE Capital controlled Comptech in any broader context, and certainly not so as to hold it liable for Comptech's failure to notify its employees that the plant was closing.

In summary, the plaintiff class has failed to meet its burden of proof on either the alter ego or the instrumentality theories. We conclude that there is no evidence that GE

Capital controlled Comptech's functional operations, assumed actual, participatory control of the company, or so dominated and controlled its affairs that its separate existence was a mere sham. Accordingly, we will deny plaintiffs' motion for summary judgment insofar as it relies on either the alter ego or instrumentality doctrines, and will grant summary judgment in favor of the defendants on these theories.

D. Direct Liability under WARN

The plaintiffs' final argument is that GE Capital is directly liable as an employer under the WARN Act because (1) it made the decision to close the plant, (2) it controlled and operated Comptech as a business enterprise, and (3) it acted in ways which are inconsistent with the conduct of a secured lender.

In deciding when a secured lender may be found directly liable as a WARN employer, wer return to the decisions in Weslock, 66 F.3d 241 (6th Cir. 1995), and Adams 87 F.3d 269 (8th Cir. 1996), the only two cases which have addressed this question. Each of these cases held that WARN liability may attach to a secured lender if the requisite degree of control over the borrower has been reached. A brief summary of the courts' reasoning will be helpful in our analysis.

The loan in Adams was secured by a number of restrictions in the loan documents, including a security interest in the company's assets, a lockbox arrangement for the company's cash receivables, and a revolving line of working capital for daily operations. The loan document further permitted the lender to monitor the company's assets.

inventory, and expenditures, and to prohibit changes in the company's capital structure. Id. at 272. The court found these restrictions perfectly compatible with the lender's need to secure a loan of over eighteen million dollars. Id. The Adams court did not reach the ultimate issue of when such control exists, since it found that the creditor had never operated the plant as a business enterprise in the normal sense, and that the relationship between the parties was never more than a traditional debtor-creditor relationship. Id. at 272-73.

The Adams court also addressed the extent of the lender's influence over management decisions, which included suggesting management changes, recommending that the company hire certain individuals, proposing new methods to improve the company's profitability, and closely monitoring the company's "deteriorating financial condition." Adams, 87 F.3d at 272. Since these are the sorts of actions a major lender would take vis-a-vis a troubled borrower, none of these made the lender a WARN employer. The court found the lender's influence over the company "entirely consistent with the type of control a secured creditor legitimately may exercise over a defaulting debtor to protect [its security interest]." Adams, 87 F.3d at 272, quoting Weslock Corp., 66 F.3d at 24.

In circumstances similar to those before us, the creditor in Adams ultimately refused to provide additional working capital and called in its loans, knowing that without these funds the company would be forced to close. The court specifically found that this did not make the lender an employer under WARN. The court found it significant that the lender did not hire, fire, pay, or supervise the company's

employees, and thus did not assume an employer's role with those employees. In its role as a secured creditor, "it took possession of its collateral and never reopened the plant for business." Adams, 87 F.3d at 273.

In Weslock, the only other court of appeals decision to have addressed lender liability as a WARN employer, the security agreement provided that the loans would be secured by the borrower's manufacturing plants. When the borrowers defaulted after nearly four years, the secured creditor agreed to accept the surrender of the collateral and the parties negotiated such an agreement. When the creditor refused to advance more funds, Weslock's management notified the plant's employees that their employment was terminated. At issue was whether the lender had assumed control of day-to-day operations at the plant between the ate the agreements were signed and the date the plant was closed, a period of about six days.

The Ninth Circuit found that the lender had continued to behave as a secured creditor and was not liable as a WARN employer because it did not participate in the "functional operations" of the Weslock plant: the creditor did not participate in decisions concerning production, marketing, or employment practices. Weslock, 66 F.3d at 245. In this case the lender was responsible for approving or disapproving additional credit to the company on a day-to-day basis, but such financial control did not incur WARN liability. The court held that "WARN's notice obligation simply does not apply to a secured creditor . . . whose interaction with the delinquent debtor primarily is limited to financial controls designed to preserve its security interest." Id. at 245.

Adams and Weslock clearly reaffirm the basic tenets of lender liability, which allow a creditor broad leeway to protect its security interest in the defaulting company. These include monitoring assets, inventory, and expenditures; prohibiting changes in the debtor company's capital structure; influencing management decisions and suggesting changes in personnel. A creditor may hold a security interest in the debtor's assets. It may refuse to extend additional credit, call in its loans, and take possession of secured collateral, even though these decisions will cause the debtor company to cease operations and close the facility, all without exhibiting the degree of control over the debtor's business which could result in WARN liability as an employer. Under Adams and Weslock a lender may be considered an employer under WARN only when it operates the borrower's assets as a business enterprise in the normal commercial sense; when it assumes overall responsibility for the management of the borrower's business; when it assumes an employer's role with the borrower's employees, by hiring, firing, paying, or supervising them; or when it participates int eh functional operations of the borrower's business, including making decisions regarding production, marketing, or employment practices.

Plaintiffs attempt to distinguish these two cases by asserting that the Loan Agreement gave GE Capital a higher degree of control over Comptech's business than either of the creditors in Adams or Weslock possessed. However, we reiterate our conclusion that the restrictions in the Loan Agreement are not evidence that GE Capital controlled Comptech's business activities, but instead represent legitimate steps taken by a lender to secure its investment. Much of our previous analysis of alter ego or instrumentality

liability in this case also applies to the question of direct control under WARN. *See infra* pp. 17-31. Without repeating that analysis, we find that Comptech, through its managers, controlled its own business activities within the meaning of Adams and Weslock.

Plaintiffs next contend that when GE Capital decided to stop extending credit and foreclosed on Coptech's assets, knowing that doing so would most likely force the company to close, the creditor in effect made the decision to close the plant. We do not agree. The Adams court rejected the argument that similar circumstances made the creditor an employer under WARN, and so do we. 87 F.3d at 273. GE Capital acted at all times as a secured lender, and is not liable under the statute for the decision to close the Comptech facility.

Plaintiffs also insist that GE Capital took control of Comptech's stock on July 10, 1991, and that this is evidence that the lender controlled the company from that date forward. The record, however, shows that Gaffney and Brooks held all of Comptech's common stock until they transferred that stock to Villa in June of 1994. GE Capital did have stock pledges as a legitimate security interest on its loans, as well as a "bring-along call" on Villa's stock. The plaintiffs claim that these call rights are further proof of CE Capital's control. However, both Jeanette Chen and plaintiffs' expert, Thomas A. Myers, CPA, CFA, agreed that such call rights provide a means to facilitate the sale of a company, and are not means of controlling its management or its operations. Chen. Dep. at 204; Myers Dep. at 157. We find that plaintiffs' argument that the bring-along call on Villa's stock shows that GE Capital controlled Comptech is without merit.

Finally, the plaintiffs argue that the testimony of their Expert, Thomas A. Myers, is sufficient to defeat summary judgment. In Mr. Myers opinion, GE Capital's actions were not consistent with the financial controls normally found in a debtor/creditor relationship. Myers Report at 5.

A party cannot avoid the entry of summary judgment solely on the basis of an expert affidavit, when the affidavit lacks a sufficient basis in fact. Maldonado v. Ramirez, 757 F.2d 48, 51 (d Cir. 1985). "An affidavit that is 'essentially conclusory and lacking in specific facts' is inadequate to satisfy the movant's burden" under Fed. R. Civ. P. 56(e). Id., quoting Drexel v. Union Prescription Centers, Inc., 582 F.2d 781, 789-90 (3d Cir. 1978). Although he concluded that GE Capital controlled and directed Comptech, Mr. Myers admitted that he did not have an understanding of Comptech's manufacturing operation. Myers Dep. at 18-10. Nor did he consider the company's functional operations or the roles played by the individuals in its management team. Myers Dep. at 16-17; 71-72. We must conclude that Mr. Myers' opinion lacks a sufficient basis in the relevant facts of this case for us to deny defendants' motion for summary judgment solely on its conclusions, and the plaintiffs have offered no other credible evidence to support their position that GE Capital directed and controlled Comptech so as to be liable as an employer under WARN.

Accordingly, we find that there is no evidence from which to find that GE Capital controlled Comptech so as to be held directly liable as an employer under the WARN Act.

IV. Conclusion

The circumstances that led to this lawsuit are indeed unfortunate. We are well aware that Comptech's closing worked an enormous hardship on the greater Erie area, and was a severe blow to the plant's individual employees and their families. Although a default judgment has been entered against Comptech, the plaintiff class appear to have little realistic expectation of recovery from that defendant.

However, the record shows that by extending the original credit terms in 1991, GE Capital enabled Comptech to continue its operations for several years; by extending additional credit and forgiving interest penalties despite repeated defaults, the creditor gave Comptech an opportunity to regain its financial stability. GE Capital invested in Comptech from 1989 until the fall of 1994. Comptech's success was in the best interest of both the company which wanted to continue operating, and the creditor who hoped for a return on its investment.

Our thorough review of the record in this case has convinced us that there is no material dispute of fact as to whether or not GE Capital should be held liable as an employer under WARN under any of the legal theories presented by the plaintiff class. Accordingly, we will deny plaintiffs' motion for partial summary judgment on the issue of liability, and grant summary judgment in favor of the defendants. Since we have found in favor of the defendants on the questions of liability, we need not reach the defenses asserted in their motion.

An appropriate Order follows.

December 16th 1999 /s/ _____
Maurice B. Cohill, Jr.
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THOMAS PEARSON, JOHN KOWALSKI and on behalf of themselves and all other similarly situated,	)	
Plaintiffs	)	
	)	Civil Action No.: 94-293
v.	)	Erie
COMPONENT TECHNOLOGY CORPORATION, a/k/a COMPTECH, a corporation, GENERAL ELECTRIC CAPITAL CORPORATION, a corporation, and TIFD VII-R, INC., a corporation,	)	
Defendants.		

ORDER

AND NOW, to-wit, this 16th Day of December, 1999, for the reasons set forth in the accompanying Opinion, it is hereby ORDERED, ADJUDGED, and DECREED that summary judgment be and hereby is entered in favor of the GE Capital defendants and against the plaintiff class. Accordingly, defendants' motion for summary judgment (Doc. 84) be and hereby is GRANTED, and plaintiffs' motion for partial summary judgment (Doc. 93) be and hereby is DENIED.

/s/_____
Maurice B. Cohill, Jr.
Senior United States District Judge

APPENDIX C

The Worker Adjustment and Retraining Notification Act of 1988 (the WARN Act), 29 U.S.C. §2101 et seq.

§2101. Definitions; exclusions from definition of loss of employment.

(a) Definitions

As used in this chapter –

(1) the term "employer" means any business enterprise that employs –

(A) 100 or more employees, excluding part-time employees, excluding part-time employees; or

(B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime);

(2) the term "plant closing" means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees;

(3) The term "mass layoff" means a reduction in force which –

(A) is not the result of a plant closing; and

(B) results in an employment loss at the single site of employment during any 30-day period for –

(i)(I) at least 33 percent of the employees (excluding any part-time employees); and

(II) at least 50 employees (excluding any part-time employees); or

(ii) at least 500 employees (excluding any part-time employees);

(4) the term "representative" means an exclusive representative of employees within the meaning of section 159(a) or 158(f) of this title or section 152 of Title 45;

(5) the term "affected employees" means employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer;

(6) subject to subsection (b) of this section, the term "employment loss" means (A) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (B) a layoff exceeding 6 months, or (C) a reduction in hours of wok of more than 50 percent during each month of any 6-month period;

(7) the term "unit of local government" means any general purpose political subdivision of a State which as the power to levy taxes and spend funds, as well as general corporate and police powers; and

(8) the term "parttime employee" means an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required.

(b) Exclusions from definition of employment loss

(1) In the case of a sale of part or all of an employer's business, the seller shall be responsible for providing notice for any plant closing or mass layoff in accordance with section 2102 of this title, up to and including the effective date of the sale. After the effective date of the sale of part or all of an employer's business, the purchaser shall be responsible for providing notice for any plant closing or mass layoff in accordance with section 2102 of this title. Notwithstanding any other provision of this chapter, any person who is an employee of the seller (other than a part-time employee) as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale.

(2) Notwithstanding subsection (a)(6) of this section, an employee may not be considered to have experienced an employment loss if the closing or layoff is the result of the relocation or consolidation of part or all of the employer's business and, prior to the closing or layoff –

> **(A)** the employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more that a 6-month break in employment; or
>
> **(B)** the employer offers to transfer the employee to any other site of employment regardless of distance with no more than a 6-month break in

employment, and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later.

(Pub.L. 100-379, §2, Aug. 4, 1988, 102 Stat. 890.)

(2)

No. 01-61

SEP 7 2001

IN THE

Supreme Court of the United States

THOMAS PEARSON and JOHN KOWALKOWSKI,
on behalf of themselves and all others similarly situated,

Petitioners,

v.

COMPONENT TECHNOLOGY CORPORATION, GENERAL ELECTRIC CAPITAL CORPORATION, and TIFD VIII-R INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS GENERAL ELECTRIC CAPITAL CORPORATION AND TIFD VIII-R INC.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether this case merits review by this Court pursuant to its certiorari powers where the decision of the Third Circuit does not conflict with the decision of any other federal court and rests upon well-established principles of federal labor law.

2. Whether this case merits review by this Court pursuant to its certiorari powers where the outcome of the case would be the same under any of the tests previously applied by the courts of appeals for determining "employer" liability under the WARN Act.

CORPORATE DISCLOSURE

Respondent General Electric Capital Corporation ("GE Capital"), a Delaware corporation, is wholly owned by General Electric Capital Services Inc., a Delaware corporation. General Electric Capital Services Inc. is wholly owned by General Electric Company, a New York corporation. Respondent TIFD VIII-R INC. ("TIFD"), a Delaware corporation, is wholly owned by GE Capital Services Structured Finance Group, Inc., a Delaware corporation. GE Capital Structured Finance Group, Inc. is wholly owned by General Electric Capital Corporation.

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COUNTER-STATEMENT OF THE CASE

Petitioners' Statement of the Case includes numerous misstatements and material omissions of fact. Therefore, Petitioner's Statement of the Case should be viewed with caution to the extent that it is inconsistent with the facts set forth below. In addition, Petitioners' Appendices include numerous omissions and printing errors. The opinions of the district court and court of appeals in this case are accurately reproduced in the official reporters. The opinion of the district court may be found at *Pearson v. Component Technology Corp.*, 80 F. Supp. 2d 510 (W.D. Pa. 1999). The opinion of the Court of Appeals for the Third Circuit may be found at *Pearson v. Component Technology Corp.*, 247 F.3d 471 (3d Cir. 2001).

A. Procedural History

Petitioners are former employees of Component Technology Corporation ("Comptech"), a corporation previously engaged in the business of designing, manufacturing and assembling precision plastic products. Petitioners commenced this action against Comptech, GE Capital and TIFD on November 2, 1994 in the United States District Court for the Western District of Pennsylvania.[1] Petitioners' complaint alleged that Comptech had failed to provide its employees with prior notice of the closing of its plant in Erie, Pennsylvania, as required by the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101, *et seq.* (the "WARN Act"). Based upon allegations that GE Capital "directly controlled all

1. Hereinafter, GE Capital and TIFD are referred to collectively as the "GE Capital Defendants."

management decisions" of Comptech and that Comptech "was the equivalent to, and the alter ego of General Electric Capital Corporation and/or vice versa," Petitioners' complaint asserted that the GE Capital Defendants are also liable for Comptech's alleged violation of the WARN Act.

On May 18, 1995, the district court certified the case to proceed as a class action under FED. R. CIV. P. 23. The class consisted of former employees of Comptech who were terminated from employment as of October 14, 1994. No appearance was entered on behalf of Comptech, and, on May 30, 1995, the district court entered a default judgment against Comptech.

After the completion of discovery, the GE Capital Defendants and plaintiffs filed cross-motions for summary judgment. On December 17, 1999, the district court entered a Memorandum Opinion and Order granting the GE Capital Defendants' motion and denying plaintiffs' cross-motion. *Pearson v. Component Technology Corp.*, 80 F. Supp. 2d 510 (W.D. Pa. 1999). On April 13, 2001, the United States Court of Appeals for the Third Circuit affirmed. *Pearson v. Component Technology Corp.*, 247 F.3d 471 (3d Cir. 2001).

B. Facts

In June of 1989, GE Capital made term loans and provided a revolving credit facility in the aggregate amount of $24,950,000 to Comptech and related borrowers. Comptech defaulted on principal and interest payments a little more than a year after the loans were made. On July 10, 1991, as a result of Comptech's repeated defaults, GE Capital called the loans and exercised its rights under the parties' loan and security agreements, including stock pledge agreements executed by Comptech's shareholders.

After GE Capital exercised its stock pledge rights, Thomas Gaffney, the chairman of Comptech's Board of Directors, was retained as the company's chief executive officer. Gaffney, who had extensive experience in the plastics industry, promoted Richard H. Brooks, Comptech's executive vice-president, to the position of president of Comptech.

On March 30, 1992, GE Capital sold all of the common stock of Comptech to entities controlled by Gaffney and Brooks. At or around the same time, GE Capital restructured its loans to Comptech to reflect the company's current financial situation and its diminished capacity to repay its loans. In the process, GE Capital wrote-off in excess of $20 million of Comptech's debt obligations. Comptech's remaining debt was restructured in the form of three term loans, a revolving line of credit, and preferred stock.

In 1994, Gaffney terminated Richard Brooks as president of Comptech and appointed Charles V. Villa as the company's new president. Gaffney had previously hired Villa as a consultant to Comptech. In June of 1994, Gaffney and Brooks sold all of their stock in Comptech to Villa.

After restructuring the account, GE Capital continued to support Comptech through additional loans and extensions of credit. Despite this financial support, Comptech was unable to return to profitability and financial health. Suspecting that the end was near, Comptech contemplated a plant closure and contacted its attorneys to inquire about WARN Act notification requirements. On September 23, 1994, Comptech and its subsidiary, Accu-Form, Inc. ("Accu-Form"), presented financial projections to GE Capital that demonstrated that Comptech and Accu-Form would need approximately $2 million in excess of their existing credit

line in order to meet the companies' working capital requirements for the remainder of 1994. Comptech and Accu-Form asked GE Capital to increase its funding to the companies and advised GE Capital that they had sought additional capital from other sources in the form of new loans and equity investments. By this time, Comptech and Accu-Form had also failed to pay principal and interest to GE Capital when due pursuant to the terms of the credit agreement between them, which gave rise to further defaults by Comptech and Accu-Form.

On or about October 7, 1994, GE Capital advised Comptech that it would not provide additional loans to Comptech and Accu-Form. Comptech's president, Charles Villa, informed GE Capital that, although Comptech continued to seek alternative sources of financing and capital from Citibank Venture Capital Limited and other possible sources of funding, Comptech had not been successful in obtaining alternative financing or any new equity commitment.

Thereafter, GE Capital and Comptech commenced negotiations concerning whether GE Capital would accept title to certain collateral in satisfaction of the then-outstanding indebtedness of Comptech and Accu-Form pursuant to section 9-505 (b) of the Pennsylvania Commercial Code, 13 Pa.C.S. § 9-505(b). Both Comptech and Villa were represented by counsel during these negotiations. On October 13, 1994, Comptech and GE Capital executed agreements, including an Asset Turnover Agreement, an Asset Retention and Purchase Agreement, and a Supplemental Funding Agreement. Pursuant to the Asset Turnover Agreement, Comptech surrendered to TIFD the assets it had pledged as collateral to GE Capital.

On October 14, 1994, without an alternative source of financing for Comptech's operations, Villa had no choice but to close Comptech's plant in Erie and inform all employees that they were being permanently laid off. Villa provided Comptech's employees with a formal notice of the plant closing dated October 14, 1994. Comptech was able to pay employees' accrued wages and vacation pay only because GE Capital had, in connection with negotiations regarding the consensual turnover of assets, agreed to advance additional loan funds, even though it had no obligation to do so.

Thereafter, TIFD conducted an orderly liquidation of Comptech's former assets. The proceeds of the liquidation were insufficient to satisfy Comptech's debts to GE Capital and, in 1996, GE Capital wrote-off the balance of Comptech's obligations.

REASONS FOR DENYING THE WRIT

In addition to the numerous departures from what the Rules of the Supreme Court of the United States require of Petitions for Certiorari, the Petition in this case fails to set forth any compelling reason to suggest that the decision of the Third Circuit merits the attention of the Supreme Court of the United States. Not only is the opinion of the Third Circuit well reasoned, rationally supported by the Department of Labor's findings and intent as set forth in the regulations, and grounded solidly in the record, the Petition fails to show that the ruling below conflicts in any meaningful way with the decision of another federal court of appeals. Further, the Third Circuit reasonably applied the five factors set forth in the Department of Labor regulations and used "relevant concepts of federal law" to substantiate its interpretation of

those factors. *See* 54 Fed. Reg. 16,045 (Apr. 20, 1989). Consequently, the Third Circuit has not "so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power." SUP. CT. R. 10(a). Finally, the greater part of the Petition is devoted to the argument that the Third Circuit interpreted the Department of Labor factors as imposing too strict a standard. Simply put, Petitioners argue that the Third Circuit misapplied the Department of Labor factors and, instead, should have applied them in much the same manner that the National Labor Relations Board applies the "integrated enterprise" test. However, even if the Third Circuit did misapply the Department of Labor factors, the "misapplication of a properly stated rule of law" is an insufficient basis for granting a petition for a writ of certiorari. SUP. CT. R. 10.

I. The Decision Of The Third Circuit Does Not Conflict With The Decision Of Any Other Federal Court And Rests Upon Well-Established Principles Of Federal Labor Law.

With some exceptions, the WARN Act prohibits an employer of 100 or more employees from ordering "a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order." 29 U.S.C. § 2101(a)(2). An employer who violates the Act's notice requirement is liable to each aggrieved employee who suffers an employment loss for "back pay for each day of violation," 29 U.S.C. § 2104(a)(1)(A), up to a maximum of 60 days. 29 U.S.C. § 2104(a)(1). However, the WARN Act authorizes the imposition of this penalty only where the plaintiffs "demonstrate that the defendant is an 'employer'

responsible for the employment loss." *Chauffeurs Sales Drivers Warehouseman & Helpers Union Local 572 v. Weslock Corp.*, 66 F.3d 241, 243 (9th Cir 1995), *citing* 29 U.S.C. § 2102(a).

The WARN Act defines the term "employer" as "any business enterprise that employs . . . 100 or more employees." 29 U.S.C. § 2101(a). Consistent with this definition, the Third Circuit identified the question presented by this litigation as whether, under the facts of this case, GE Capital was Petitioners' employer. (Appendix A at 15a) Based upon the WARN Act's definition of "employer," the Third Circuit reasoned that Petitioners could prevail on their claim only if they established that GE Capital was a "single 'business enterprise' with Comptech such that it is responsible for Comptech's WARN Act obligations." *Id.*

After thoroughly reviewing the regulations and guidance issued by the Department of Labor, prior case law addressing "employer" status under the WARN Act, and national labor policy, the Third Circuit adopted the five-factor analysis of 20 C.F.R. § 639.3(a)(2) as the best articulation of the test for determining whether related entities are a single business enterprise under the WARN Act. This regulation provides that:

> Under existing legal rules, independent contractors and subsidiaries which are wholly or partially owned by a parent company are treated as separate employers or as a part of the parent or contracting company depending upon the degree of their independence from the parent. Some of the factors to be considered in making this determination are (i) common ownership

> (ii) common directors and/or officers (iii) de facto exercise of control, (iv) unity of personnel policies emanating from a common source, and (v) the dependency of operations.

20 C.F.R. § 639.3(a)(2) (hereinafter the "Department of Labor factors").

Both the Third Circuit in this case (Appendix A at 4a, 22a, 28a) and other courts of appeals have recognized that the Department of Labor factors are very similar to the "integrated enterprise" or "single employer" test for determining single employer status. *See, e.g., International Brotherhood of Teamsters Local 952 v. American Delivery Service*, 50 F.3d 770 (9th Cir. 1995). The integrated enterprise test, which was first developed by the National Labor Relations Board, looks to four labor-related characteristics of affiliated corporations: (1) common ownership; (2) common management; (3) centralized control of labor relations; and (4) interrelation of operations. *See, e.g., Radio & Television Broad Period Techs. Local Union 1264 v. Broadcast Serv. of Mobile*, 380 U.S. 255, 256 (1965) (per curium).

In *International Brotherhood of Teamsters Local 952 v. American Delivery Service*, 50 F.3d 770 (9th Cir. 1995), the Ninth Circuit noted the substantial similarity between the Department of Labor factors and the integrated enterprise test and applied these tests concurrently in affirming the entry of summary judgment for the defendant in that case. *Id.* at 776. The Ninth Circuit also observed that considerable overlap exists among not only the Department of Labor factors and the integrated enterprise test, but also state corporate veil-piercing doctrines. Under each of these

"control" theories of liability, the "basic point of inquiry is clear: Has [the defendant] structured its relationship with the [direct employer] in such a fashion as to control [the direct employer] and, at the same time, avoid [its own] obligations under federal law?" *Id.*

One commentator has observed that the integrated enterprise or single employer test and the Department of Labor factors represent essentially the same analysis. Cynthia Nance, *Affiliated Corporation Liability Under the WARN Act*, 52 Rutgers L. Rev. 495, 546 (2000). "[A] careful comparison of the two tests reveals that although they use different labels to describe the relationship between related entities, there is no real difference between the two tests." *Id.* The Department of Labor factors are merely an expansion of the four-factor single employer test. For example, the first Department of Labor factor is common ownership. This factor is identical to the first factor or the single employer test. Common directors and de facto exercise of control, unity of personnel policies, and dependency of operations are more specific indicia of common management, centralized control of labor relations, and interrelationship of operations. *Id.* Thus, there is no conflict between the Department of Labor factors and the integrated enterprise test.

The Department of Labor's "supplementary information" regarding its WARN Act regulations explains that the Department of Labor factors were not intended to create new rules for assessing the status of affiliated companies. 54 Fed. Reg. 16,045 (April 20, 1989). Instead, the Department of Labor factors were designed only to summarize existing law that has developed under statutes such as the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* (West 2001), the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*

(West 2001), the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* (West 2001), and relevant principles of state corporations law. *Id.* This intent is further reflected in the substantial similarities between the Department of Labor factors and the integrated enterprise test.

Each court of appeals to address the subject has adopted either the Department of Labor factors or the integrated enterprise test, or regarded the tests as essentially the same, for purposes of assessing the status of affiliated companies under the WARN Act. No court of appeals has adopted the approach utilized by the district court in *Local 397, International Union of Electronic, Electrical Salaried Machine & Furniture Workers v. Midwest Fasteners, Inc.*, 779 F. Supp. 788 (D.N.J. 1992). In *Midwest Fasteners*, the district court analyzed the facts of the case under corporate veil-piercing principles as well as the integrated enterprise test and the DOL factors. *Midwest Fasteners* has been criticized for injecting state law concepts into a question of federal law. To the extent that *Midwest Fasteners* created uncertainty and possible conflict in the "employer" liability analysis under the WARN Act, the decision of the court of appeals obviated these problems by making it clear that *Midwest Fasteners* is not the law in the Third Circuit. Consistent with all other circuits, the Third Circuit has recognized that state law veil-piercing principles play a limited role in the determination of "employer" status under the WARN Act. Such state law concepts enter into the analysis only to the extent they are consistent with principles of federal law as reflected in the Department of Labor factors and the integrated enterprise test. (Appendix A at 42a).

The decision of the Third Circuit in this case is also consistent with *Adams v. Erwin Weller Co.*, 87 F.3d 269

(8th Cir. 1996) and *Chauffeurs, Sales Drivers, Warehousemen & Helpers Union 572 v. Weslock Corp.*, 66 F.3d 241, 245 (9th Cir. 1995). Each of those cases addressed attempts by employees of defunct companies to impose liability upon secured lenders under the WARN Act based upon the lender's involvement with its borrower's business affairs. In each case, the court of appeals affirmed the entry of summary judgment in favor of the defendant lender. The Eighth and Ninth Circuits held that a lender can be considered an "employer" under the WARN Act only where the lender assumes a certain level of control over the management of the borrower. "Only when a lender becomes so entangled with its borrower that it has assumed responsibility for the overall management of the borrower's business will the degree of control necessary to support employer responsibility under WARN be achieved." *Adams*, 87 F.3d at 272. In determining whether the defendant assumed responsibility for the overall management of the borrower's business, the courts focused on the borrower's "functional operations." *Weslock*, 66 F.3d at 245. "Without some evidence showing [the lender's] involvement in the functional operations of the [borrower's] facility, there can be no finding that [the lender] is an employer under WARN." *Id.*

The Third Circuit criticized the Eighth and Ninth Circuits for placing too much emphasis on whether a lender's conduct relative to its borrower's business was "typical" of a secured lender. The Third Circuit noted that "typical" lender behavior is a "mutable concept" and that such conduct will respond to the liability rules that the courts put into place. (Appendix A at 41a). Therefore, the Third Circuit held that "although courts should attend to the customary relationship between lender and borrower (just as they have attended to customary relationships between parents and subsidiaries in determining liability), they should also make a functional assessment of the amount of control involved." (Appendix A at 41a).

These observations, however, do not evidence a conflict among the circuits as Petitioners contend. To the contrary, a review of the decisions of the Third, Eighth and Ninth Circuits reveals that they are in complete accord in all material respects. Both the Eighth and Ninth Circuits recognized that

> "the crucial question" [in determining whether a defendant was an employer under the WARN Act] is not the status of the defendant's legal relationship to the business but, instead, [whether] at the time of the plant closing or mass layoff the defendant [was] responsible for operating the business as a going concern.

Weslock, 66 F.3d at 244; *Adams*, 87 F.3d at 272. This inquiry parallels the "functional analysis" adopted by the Third Circuit as both approaches look beyond traditional indicia of corporate ownership to determine whether, as a matter of fact, one entity actually controls another in the operation of the business enterprise in the "normal commercial sense."

Petitioners' first argument is that the decision of the Third Circuit is in direct conflict with the Eighth and Ninth Circuits because "the Third Circuit applied the same test for lenders and affiliated corporations, which [the Eighth and Ninth] Circuits did not." (Petitioners' Brief at 5). In *Weslock*, the Ninth Circuit applied its "normal commercial sense" test to determine lender liability under the WARN Act. By contrast, in *International Brotherhood v. American Delivery*, 50 F.3d 770 (9th Cir. 1995), the Ninth Circuit applied the "single employer" or "integrated enterprise" test to determine affiliate liability under the WARN Act. However, despite their contention that the Third Circuit's decision is inconsistent

because it applies the same test for both affiliate and lender liability, Petitioners devote the greater part of their argument to the proposition that the same "integrated enterprise" test used by the Ninth Circuit for affiliate liability under the WARN Act should *also* be applied by courts in determining *lender* liability. This thinly veiled attempt to show inconsistency among the Circuits betrays the true reason Petitioners seek the Court's review. Petitioners appear to be dissatisfied with the Third Circuit's application of the Department of Labor factors as those factors require a more restrictive inquiry than would the integrated enterprise test. Although the Department of Labor easily could have adopted the integrated enterprise factors as the factors to be considered by courts in determining liability under the WARN Act, it declined to do so. Petitioners' dissatisfaction with the Third Circuit's application of the Department of Labor factors is insufficient to warrant the Court's review.

Petitioners' second argument is that the decision of the Third Circuit is inconsistent with the decision of the Ninth Circuit in *Weslock* because, although "both Circuits determined that a secured lender can be a WARN Act employer, the Ninth Circuit applied a different test. The Ninth Circuit determined that a secured lender can be liable under the WARN Act when it operates the business enterprise in the 'normal commercial sense.' " (Petitioners' Brief at 5, *citing Weslock*, 66 F.3d at 245). Petitioners also contend that the decision of the Third Circuit is at odds with the Eighth Circuit's decision in *Adams* because "the Eight[h] Circuit adopted the Ninth Circuit's test that a lender became a WARN Act employer when the lender operates the borrower's assets as a business enterprise in the normal commercial sense." (Petitioners' Brief at 6, *citing Adams*, 87 F.3d at 272). As explained below, however, the decisions of the Third, Eighth and Ninth Circuits are entirely consistent.

In *Weslock*, the Ninth Circuit considered whether the lender, through its agent, exercised complete control in the day-to-day operations of the borrower, such as participating in decisions concerning the borrower's production output, the marketing of the borrower's product, and the borrower's employment practices. *Weslock*, 66 F.3d at 245, *citing Long Beach Unified Sch. Dist. v. Godwin Cal. Living Trust*, 32 F.3d 1364, 1367 (9th Cir. 1994) (before a defendant can be an operator of a hazardous waste facility under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") the defendant "must play an active role in running the facility, typically involving hands-on, day-to-day participation in the facility's management").

In this case, the Third Circuit explicitly stated that, other than the financial controls and stock interests incident to the loan agreement, "[GE Capital] had no formal authority to control Comptech's business decisions, including its strategic planning, its relationships with clients, its marketing, its product selection, its product design, or its quality control." (Appendix A at 12a). Similarly, when it applied the "dependency of operations" prong, the Third Circuit considered and rejected the Petitioners' contention that GE Capital, through Gaffney and Villa, exercised control over the day-to-day operations of Comptech through an "agency" relationship. (Appendix A at 53a). Specifically, in finding that the communications from Gaffney and Villa to GE Capital requesting additional financing to support certain large-scale expenditures and to release liens on certain assets were insufficient to support a finding of dependency of operations, the Third Circuit observed that GE Capital's approval or disapproval of these requests was nothing more than the exercise of "one of the defining rights of a secured lender: the right to prevent the transfer of collateral."

(Appendix A at 56a). Contrary to the Petitioners' contention, the Third Circuit did consider whether GE Capital had operated Comptech as a "business enterprise in the normal commercial sense" and concluded that it had not. The Third Circuit also noted that "the fact that Comptech independently sought additional financing from an outside lender to replace [GE Capital] cuts against a conclusion that Comptech was closely integrated with [GE Capital] itself." (Appendix A at 56a-57a). Put another way, the Third Circuit found that, as a matter of fact, Comptech and GE Capital were distinct entities and that as GE Capital did not exercise control over the day-to-day operations of Comptech, it did not operate Comptech as a business enterprise in the normal commercial sense.

Petitioners recognize that the Ninth Circuit's "normal commercial sense" test is equivalent to the Eighth Circuit's "entanglement" test. (Petitioners' Brief at 6). Petitioners also point out that the Eighth Circuit declined to decide how much "operational decision-making," or entanglement, it would take for a lender to be treated as an employer under the WARN Act. (Petitioners' Brief at 6). The Third Circuit's adoption of the Department of Labor factors as the test for lender and affiliate liability under the WARN Act clarified, in objective terms, the principles previously recognized by the Eighth and Ninth Circuits. The Third Circuit's decision is entirely consistent with the decisions of the Eighth and Ninth Circuits. All three courts engaged in substantially the same analysis, although the Third Circuit took a more analytical approach.

II. The Decision Of The Third Circuit Resolves Any Conflict Found To Exist Among The Circuits.

In its opinion, the Third Circuit recognized that

> the problem with creating a sharp distinction in liability rules under the WARN Act for lenders and for parents is that it will not always be clear when a party should be characterized as a "lender," when a party should be characterized as a parent or owner, and when a party occupies both roles.

(Appendix A at 37a). Therefore, "[t]he current trend toward applying more than one test is manifestly unworkable." (Appendix A at 28a-29a). Likewise, the Petitioners acknowledge the apparent "confusion surrounding affiliated and lender liability under the WARN Act" and invite the Court to clarify those issues. (Petitioners' Brief at 7). Petitioners then proceed to argue that the "inconsistency" arising from the Ninth Circuit's use of separate tests for affiliated liability and lender liability, and the Third Circuit's far more straightforward use of the five-factor test for both, warrants this Court's review. (Petitioners' Brief at 7-8). Notwithstanding the inherently contradictory nature of the Petitioners' argument, any alleged inconsistency is not sufficiently important to compel the Court's review. If, as they assert, the Petitioners seek clarification of affiliated and lender liability under the WARN Act, they need look no further than the Third Circuit's opinion.

The use of multiple tests to determine WARN Act liability generates considerable uncertainty. Parties potentially affected by the WARN Act will be reduced to

mere guesswork in determining which test probably applies. This uncertainty prevents lenders from accurately assessing their exposure to risk and, in borderline cases, may ultimately result in their refusal to extend financing to troubled business enterprises as they would be unable to adequately protect their investment without incurring WARN Act liability. The application of a single test for determining legal responsibility under the WARN Act obviates this need for speculation and provides lenders and affiliates alike with objective factors with which to assess the likelihood of liability. Additionally, it removes any disincentive for lenders to "rescue" financially troubled businesses and return them to profitability.

As the Third Circuit's decision notes, "[t]he [Department of Labor] factors are the best method for determining WARN Act liability because they were created with the WARN Act in mind and, unlike traditional veil-piercing and some of the other theories, focus particularly on circumstances relevant to labor relations." (Appendix A at 30a). The Third Circuit's decision resolves any confusion not only by applying a uniform test for WARN Act liability, but also by giving proper effect to the national labor policy considerations inherent in the WARN Act.

III. After Applying the Department Of Labor Factors, The Third Circuit Properly Concluded That GE Capital Was Not Liable Under The WARN Act.

In their complaint, Petitioners alleged that GE Capital "directly controlled all management decisions" of Comptech. In the proceedings in the district court, however, Petitioners were unable to produce competent or admissible evidence to support this allegation. This absence of evidence alone required the entry of summary judgment in favor of the

GE Capital Defendants. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (entry of summary judgment mandated where plaintiff fails to make a showing sufficient to establish the existence of an element essential to plaintiff's case, on which plaintiff will bear the burden of proof at trial).

Rather than rely exclusively on Petitioners' lack of evidence to defeat their claims, the GE Capital Defendants produced uncontradicted evidence to establish that Comptech's local managers, not GE Capital, operated and managed Comptech. This record included the depositions and affidavits of the individuals who served as Comptech's senior managers, including Comptech's president, plant manager, vice-president of operations, director of sales and marketing, controller and acting chief financial officer, vice-president of product and corporate development, and director of human resources. Comptech's managers testified that they managed and controlled the operations of Comptech, including its strategic planning, product selection, product design, manufacturing, quality control, inventory control, pricing, sales and marketing, personnel, finance and accounting, and customer relations. They also acknowledged that their contact with GE Capital consisted of routine reporting and interaction.

In applying the Department of Labor factors to the facts of this case, the Third Circuit concluded that, although Petitioners had submitted evidence sufficient to support the "common ownership" factor, the record could not support the remaining three factors of the analysis. Specifically, the Third Circuit determined that GE Capital and Comptech did not have common directors, officers, or other indicia of common management. In addition, the Third Circuit found no unity of personnel policies, no dependency of operations, and that GE Capital did not exercise de facto control over Comptech, including its decision to close its manufacturing facility in Erie.

The outcome of this case would have been precisely the same under the approach taken by the Eighth and Ninth Circuits in their respective WARN Act lender liability cases. Both the Eighth and the Ninth Circuits recognized that "the mere fact the loan documents give some control over the borrower to protect the lender's security interest does not automatically make the lender a WARN employer." *Adams*, 87 F.3d at 272; *Weslock*, 66 F.3d at 244. The Eighth Circuit further acknowledged that "lenders who loan large sums of money must be afforded substantial leeway in pursuing their bargained-for rights with a borrower in financial distress." *Adams*, 87 F.3d at 272-273. In this respect, the Eighth and Ninth Circuits, like the Third Circuit, apparently sought to avoid creating "a jurisprudence that discourages loans in general or rescues of troubled business enterprises in particular." (Appendix A at 56a.)

Finally, in applying their respective tests, both the Eighth and Ninth Circuits undertook an analysis almost identical to the "dependency of operations" and the "de facto exercise of control" factors considered by the Third Circuit. *Adams*, 87 F.3d at 271-273; *Weslock*, 66 F.3d at 244-245. Additionally, the Eighth Circuit briefly considered the "unity of personnel policies emanating from a common source" factor at the end of its opinion. *Adams*, 87 F.3d at 273. After considering these factors, both Circuits arrived at conclusions consistent with that of the Third Circuit. Given the identity of the considerations taken into account by the Third, Eighth and Ninth Circuits in formulating their respective opinions as well as the consistency of the outcomes, it cannot be refuted that the Eighth and Ninth Circuits would have arrived at results consistent with that of the Third Circuit in this case.

CONCLUSION

For all of the foregoing reasons, Respondents, General Electric Capital Corporation and TIFD VIII-R INC., respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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